Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ALLAN J. FAVISH,

Petitioner

v.

OFFICE OF INDEPENDENT COUNSEL, SHEILA FOSTER ANTHONY, LISA FOSTER MOODY,

Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED FOR REVIEW

This Court has held that Congress intended that the phrase "personal privacy," as used in an exemption in the federal Freedom of Information Act ("FOIA"), means the right to control information about oneself and that the exemption should be narrowly construed. The first question is whether the United States Court of Appeals for the Ninth Circuit can create a new definition for the phrase that expands the scope of the exemption beyond what this Court has held Congress intended, thereby giving a deceased's surviving family members a privacy interest under the FOIA in photographs of the deceased's dead body, when those photographs do not contain any information about those family members.

This Court has held that the FOIA's basic purpose is to allow citizens access to government information in order to keep the government honest. The second question is whether the Ninth Circuit can create a new definition for the phrase that is inconsistent with this basic purpose.

The third question is whether photographs sought under the FOIA should be subject to partial redaction, like text documents, so that if any information in the photographs is exempt from disclosure, the nonexempt information in the photographs can be disclosed.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS ENTERED BELOW

The United States District Court for the Central District of California entered two summary judgments in this case. The first summary judgment is unreported. App., *infra*, 1a. The opinion of the United States Court of Appeals for the Ninth Circuit, setting forth its new definition of "personal privacy," is reported at *Favish v. OIC*, 217 F.3d 1168 (9th Cir. 2000). App., *infra*, 16a. The second summary judgment by the district court, which withheld certain photographs in their entirety, was based on the Ninth Circuit's definition of "personal privacy" and did not discuss redaction of the photographs, is unreported. App., *infra*, 53a. The order of the Ninth Circuit affirming, in part, the district court, without discussing the "personal privacy" or redaction issues, is unreported. App., *infra*, 56a. The order of the Ninth Circuit denying Respondents' petitions for rehearing and suggestions for rehearing en banc, is unreported. App., *infra*, 58a.

JURISDICTION

Favish v. OIC, 217 F.3d 1168 (9th Cir. 2000) (App., *infra*, 16a) was filed July 12, 2000. The district court entered its second summary judgment January 12, 2001 (App., *infra*, 53a). The Ninth Circuit's order affirming the summary judgment, in part, was filed June 6, 2002 (App., *infra*, 56a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (which provides that this Court may exercise certiorari jurisdiction "before or after rendition of judgment or decree" by a federal court of appeals).

STATUTES INVOLVED

The Freedom of Information Act ("FOIA"), provides, in part:

> (a) Each agency shall make available to the public information as follows:
>
> . . . .
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A).

The FOIA also provides:

> (b) This section does not apply to matters that are
>
> . . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .
>
> .

5 U.S.C. § 552(b)(7)(C).

STATEMENT OF THE CASE

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner filed a lawsuit under the FOIA against Respondent Office of Independent Counsel ("OIC") to obtain certain photographs taken in connection with the investigation of the July 20, 1993 death of Deputy White House Counsel Vincent Foster ("Foster"). The OIC withheld photographs of Foster's body taken in Virginia's Fort Marcy Park on the basis of the "personal privacy" exemption in the FOIA, 5 U.S.C. § 552(b)(7)(C).

The district court entered its first summary judgment against Petitioner March 11, 1998, without viewing the original photographs in camera. App., *infra*, 1a.

On July 12, 2000, in deciding the first appeal in this case, the Ninth Circuit reversed and remanded, and ordered the district court to view the photographs in camera. App., *infra*, 16a. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." App., *infra*, 24a. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." App., *infra*, 24a. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." App., *infra*, 25a.

Applying the Ninth Circuit's interpretation of the "personal privacy" exemption, on January 12, 2001, the

district court entered a summary judgment ordering the OIC to release five of the ten disputed photographs and allowing the OIC to withhold the other five. App., *infra*, 53a. The district court did not discuss possible redaction of the photographs ordered withheld that would allow nonexempt information from the photographs to be released. App., *infra*, 53a.

On June 6, 2002, without discussion, the Ninth Circuit affirmed the summary judgment, except that it ordered an additional photograph withheld. App., *infra*, 56a.

On August 16, 2002, the Ninth Circuit denied Respondents' petitions for rehearing and suggestions for rehearing en banc. App., *infra*, 58a.

REASONS FOR GRANTING THE WRIT

1. Review Is Warranted Because The Ninth Circuit's Interpretation Of The FOIA's "Personal Privacy" Exemption Conflicts With Congressional Intent And This Court's Precedents, Thereby Wrongfully Expanding The FOIA's "Personal Privacy" Exemption

This Court has held: "Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten."[1] Therefore, the correct interpretation of the FOIA's "personal privacy" exemption begins and ends with the intent of those who drafted it in 1966. What Congress meant by that phrase is the central issue. The preferences of judges and litigants about whether the phrase "personal privacy" means something other than

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[1] *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 569 n.27, 110 L.Ed.2d 492 (1990).

what it meant to the FOIA's drafters or whether there should be a FOIA exemption for "emotional distress," are immaterial.

Moreover, this Court has held that to ensure maximum disclosure, the FOIA's exemptions should be narrowly construed.[2]

By imposing a definition of the FOIA's "personal privacy" exemption that deviates from the intent of the Congress that created it, the Ninth Circuit violated the basic rule of statutory construction and has significantly eroded the FOIA. There are two reasons why this Court should protect the FOIA by striking down the Ninth Circuit's new definition of the exemption. First, as used in the FOIA, "personal privacy" means the right to control information about oneself. The disputed photographs do not contain any information about Foster's surviving family members. Therefore, the exemption is inapplicable to this case. Secondly, the new definition contradicts the primary purpose of the FOIA. By stating that "intrusion of the media would constitute invasion" of the survivors' memory of the deceased (App., *infra*, 24a), the Ninth Circuit allows the government to withhold information that in many cases will be the most deserving of disclosure because it is so revealing of government corruption or negligence that it will attract media attention.

Interpreting the "personal privacy" exemption in the FOIA, this Court held that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."[3] In

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[2] *Department of the Air Force v. Rose*, 425 U.S. 352, 360-361, 48 L.Ed.2d 11 (1976).

[3] *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-63, 764 n.16, 103 L.Ed.2d 774 (1989).

Reporters Committee, this Court expressly described only two definitions of "privacy" and neither of them was a broad right to have one's memory of a deceased family member protected.

"One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[4] This first interest is classic privacy, which Charles Fried explained in his seminal law review article as "control over knowledge about oneself."[5] Fried also explained that privacy is best thought of as a subcategory of the broader interest in personal liberty: "Most obviously, privacy in its dimension of control over information is an aspect of personal liberty."[6] Thus, with liberty being the freedom to do things without interference, privacy is the more specific freedom to do a particular thing: control information about oneself.

When discussing this first privacy interest, this Court quoted many authorities for support of the central proposition that privacy encompasses "the individual's control of information concerning his or her person."[7] These quotes include: "Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure."[8] "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression,

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[4] *Id.*, at 762 (citation omitted).

[5] Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968) (quoted in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 n.5 (3d Cir. 1980)).

[6] *Reporters Committee*, *supra*, 489 U.S. at 762.

[7] *Id.*, at 763.

[8] *Id.*, at 763 n.14 (quoting Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 Law & Contemporary Problems 342, 343-344 (1966)).

he generally retains the power to fix the limits of the publicity which shall be given them."[9] Information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public."[10] "Privacy . . . is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself."[11] "Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[12] "The right of privacy is the right to control the flow of information concerning the details of one's individuality."[13]

This Court in *Reporters Committee* made it extremely clear that privacy, especially as that word was used by Congress in the FOIA's "personal privacy" exemption, is the right to control information about oneself and there is no support in this Court's cases for the Ninth Circuit's new definition of "personal privacy" as a broad right to have one's memory of a deceased family member protected from violation by media intrusion or otherwise.

The second type of privacy interest discussed in *Reporters Committee*, the interest in independence in making certain kinds of important decisions, is part of a more broadly based liberty interest that should not be described as privacy. This became clearer when subsequent to *Reporters*

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[9] *Id.*, at 763 n.15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890-1891)).

[10] *Id.*, at 763-764 (quoting Webster's Third New International Dictionary 1804 (1976)).

[11] *Id.*, at 764 n.16 (quoting A. Breckenridge, *The Right to Privacy* 1 (1970)).

[12] *Id.*, at 764 n.16 (quoting A. Westin, *Privacy and Freedom* 7 (1967)).

[13] *Id.*, at 764 n.16 (quoting Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1225 (1974-1975)).

Committee, this Court endorsed the proposition that the right to refuse medical care is an aspect of liberty, rather than the more narrow subpart of the liberty interest known as privacy: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[14]

However, the debate over whether the freedom to do things like get an abortion or refuse medical care are correctly described as aspects of privacy or are better described as part of a more general liberty interest is not essential to resolution of the present issue. The important point is that this Court in *Reporters Committee* described privacy as the right to control information about oneself and did not describe it as a broad interest in having one's memory of a deceased family member protected, from media intrusion or otherwise, or as a broad interest in freedom from emotional distress. Not only would such a broad definition of "personal privacy" conflict with the FOIA's basic purpose of providing a check on government corruption and negligence, as explained below, it would render the word useless since it would subsume anything that "violates" a person's memory of a deceased family member.

There is another reason why the Ninth Circuit's expansive new definition deviates from the definition of "personal privacy" as intended by Congress in 1966. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the government honest in order to preserve our constitutional democracy.[15] The District of Columbia Circuit has discussed the nature of

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[14] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 n.7, 111 L.Ed.2d 224 (1990) (citation omitted).

[15] *Reporters Committee*, *supra*, 489 U.S. at 772-775.

the public interest that could be served by disclosure of government investigative records:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.[16]

According to this Court:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[17]

However, in contravention of this Court's command to construe the FOIA's exemptions narrowly,[18] the Ninth Circuit has construed the "personal privacy" exemption *expansively* to allow government agencies and the courts to withhold information under the FOIA when its disclosure would "violate" a person's memory of a deceased family member, perhaps by causing the media to contact the surviving family member. App., *infra*, 24a. Especially in a death case, the more the documents indicate the possibility of government corruption or negligence, the more likely it is that the media will take action that may affect the survivors' memories of the deceased if the documents are disclosed. Therefore, under the Ninth Circuit's new definition, the greater the possible corruption or negligence, the greater the

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[16] *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

[17] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d 159, 178 (1978).

[18] *Dep't of the Air Force, supra*, 425 U.S. at 360-361.

reason to keep the documents from the public. However, there is no evidence in the legislative history of the FOIA indicating that Congress intended that the documents in a government death investigation most revealing of possible government corruption or negligence are the documents that deserve the most protection from public disclosure because they also would be the documents most likely to cause the media to affect the survivors' memories of the deceased. Therefore, the Ninth Circuit's new definition conflicts with the basic purpose of the FOIA, which is to provide a check against government corruption and negligence.[19]

The Ninth Circuit's new definition of "personal privacy" fails to construe that exemption narrowly and conflicts with Congressional intent and this Court's precedents. This Court should strike down this new definition because it wrongfully expands the "personal privacy" exemption to a point where it threatens to swallow the rest of the FOIA and do great damage to our democracy.

2. Review Is Warranted Because The Ninth Circuit's Interpretation Of The FOIA's "Personal Privacy" Exemption Conflicts With That Of The District Of Columbia Circuit

In *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000), the District of Columbia denied a FOIA request for access to *copies*[20] of some of the photographs at issue in the present case. In so doing, the D.C. Circuit never relied on a right of Foster's survivors to have their memory of him protected from violation. In a hopelessly confused opinion, the D.C. Circuit stated that its decision *did not* decide

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[19] *NLRB*, *supra*, 437 U.S. at 242.

[20] It is common knowledge that copies of Polaroids have less detail than the original photographs.

whether Foster's survivors or even Foster himself had a privacy interest in the photos![21] By denying that it decided an issue that was central to the case, the D.C. Circuit destroyed the credibility of its opinion.

Because the Ninth Circuit's new definition of the FOIA's "personal privacy" exemption is unprecedented, it conflicts with every Circuit's opinion that has ever interpreted the exemption in a case where documents about a deceased person were sought. Without review by this Court, confusion is certain to reign as the FOIA withers away.

3. Review Is Warranted Because The Ninth Circuit Did Not Consider Redaction Of The Photographs

In its order of June 6, 2002, withholding six of the ten disputed photographs, the Ninth Circuit did not discuss redaction of the photographs. App., *infra*, 56a. It is common practice for the government to disclose text documents pursuant to the FOIA with exempt information redacted. This allows the nonexempt portion of the document to be disclosed, in conformity with the FOIA. There is no reason why photographs should not also be subject to redaction when they include information that is exempt from disclosure and information that is nonexempt.

Even if the Ninth Circuit's new "personal privacy" definition were accepted, it is inconceivable that everything in the withheld photographs, if disclosed, would cause the survivors' memories to be violated, either by seeing the photographs or by receiving inquiries from the media about the photographs. By failing to consider partial redaction of the six photographs withheld, the Ninth Circuit is wrongfully

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[21] *Accuracy*, *supra*, 194 F.3d at 123.

denying disclosure of the nonexempt information in those photographs, in violation of the FOIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Allan J. Favish v. Office of Independent Counsel
CV 97-1479-WDK

ENTERED
CLERK, U.S. DISTRICT COURT
March 11, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PRESENT:
Hon. William D. Keller, Judge
Amalia Carrilo, Deputy Clerk
None Present, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: None Present

ATTORNEYS PRESENT FOR DEFENDANTS: None Present

PROCEEDINGS:

Before the Court are the parties' Cross Motions for Summary Judgment. The Court issued a preliminary ruling and held a hearing on this matter. The following is a clarification of the Court's final ruling, which was given orally at the hearing.

BACKGROUND

On January 6, 1997, Plaintiff Allan J. Favish sent to Defendant Office of Independent Counsel ("OIC") a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Plaintiff's request sought photographs taken connection with the investigation into the death of Deputy White House Counsel Vincent Foster. On January 24, 1997, the OIC denied Plaintiff's request, asserting: (1) Exemption (b)(7)(A), which exempts from disclosure law enforcement information whose disclosure could interfere with enforcement proceedings [5 U.S.C. § 552(b)(7)(A)]; and (2) Exemption (b)(7)(C), which exempts from disclosure law enforcement information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" [5 U.S.C. § 552(b)(7)(C)]. The OIC also reserved the right to assert other relevant exemptions. Plaintiff administratively appealed the OIC's decision, and the appeal was denied on February 19, 1997.

On March 6, 1997, Plaintiff filed the present "Complaint for Injunctive Relief Under the Frleedom of Information Act." On October 10, 1997, the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing Independent Counsels (the "Special Division"), permitted the OIC report on the death of Vincent Foster to be released to the public. Following the release of this report, the OIC reviewed the photographs sought by Plaintiff and modified its response. As a result, the OIC withdrew its assertion of Exemption (b)(7)(A), but still asserted Exemption (b)(7)(C). Additionally, the OIC asserted Exemption (b)(3), which exempts from disclosure matters that are specifically exempted from disclosure by a separate statute, 5 U.S.C. § 552(b)(3).

On February 12, 1998, the Court entered the parties' "Stipulation to Dismiss With Prejudice Claims As To Information Withheld Pursuant to Exemption (b)(3) and Claims As To Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains At Issue." In that stipulation, the parties dismissed with prejudice Plaintiff's claims regarding all photographs withheld pursuant to Exemption (b)(3). Stipulation, at 1:26 - 2:12. The parties also dismissed with prejudice Plaintiffs claims regarding certain photographs withheld pursuant to Exemption (b)(7)(C). Stipulation, at 2:4-12. The stipulation also identified the documents that Plaintiff still seeks. Plaintiff still seeks 11 Polaroid photographs, including 9 post-mortem photographs of Foster's body in Fort Marcy Park, 1 post-mortem photograph of Foster's right hand holding a gun, and 1 photograph of Foster's eyeglasses lying on the ground at Fort Marcy Park. Stipulation, at 2: 13-19; Defendant's Motion for Summary Judgment, at 20:19 – 21:13.

The stipulation also stated that Defendant still asserts Exemption (b)(7)(C) to withhold the 11 photographs. The parties stipulated that the remaining 11 photographs were "compiled for law enforcement uses," the threshold requirement for Exemption (b)(7)(C). Stipulation, at 2: 19-22. The parties stated that "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25. In addition, the parties noted that Plaintiff claims that Defendant is required to produce color copies of the unredacted photographs already released to Plaintiff in black and white. Stipulation, at 2:25 - 3:1.

On February 11, 1998, Plaintiff filed the present motion for summary adjudication of issues, seeking an order that (1) release of the eleven remaining photographs will not result in an unwarranted invasion of the privacy of Vincent Foster's surviving family members; and (2) release of color copies of the photographs already received is required by FOIA. On February 13, 1998, Defendant filed the present motion for summary judgment, claiming that no genuine issue of material fact exists with regard to the claimed exemption and that Defendant is entitled to judgment as a matter of law.

DISCUSSION

I. Cross Motions For Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only where there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. All reasonable inferences are granted in favor of the non-moving party, however, the non-moving party must provide specific facts showing that there are genuine issues for trial. Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). When "the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In deciding a motion for summary judgment, the court must "determine whether the 'specific facts' set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a reasonable jury might return a verdict in its favor based on the evidence." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d

626, 631 (9th Cir. 1987). A "party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). A "mere scintilla of evidence" is insufficient to oppose a summary judgment motion under Rule 56. Anderson v. Liberty Lobby Co., 477 U.S. 242, 252 (1986).

B. Eleven Remaining Contested Photographs: Privacy Exemption Under 5 U.S.C. § 552(b)(7)(C)

Exemption (b)(7)(c) exempts from disclosure "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The parties have stipulated that the remaining 11 photographs were compiled for law enforcement purposes. Stipulation, at 2:19-22. Thus, as the parties recognize, "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25.

1. Privacy Interest of Foster's Surviving Family Members

The parties take opposite positions on the question of whether Foster's surviving family members have a privacy interest in the withheld photos. Defendant claims that the family members' privacy interests exist and of the 11photographs. Defendant claims that the photographs sought by Plaintiff are "graphic, explicit, and extremely upsetting." Defendant's Motion, at 22. Defendant further claims that disclosure of these 11 photographs can reasonably be expected to cause the surviving Foster family

members anguish beyond that which they have already suffered, thus constituting an invasion of their personal privacy. Joseph Declaration, ¶¶ 15, 17. Plaintiff asserts that the concern argued by the OIC is not for the "privacy" of the Foster family members, which is protected by Exemption (b)(7)(C), but rather is an argument for a "family grief" exemption to FOIA which does not exist.

In support of its privacy argument, Defendant points to several cases which recognize such a privacy interest in surviving family members, including New York Times Co. v. National Aeronautics and Space Administration, 782 F.Supp. 628 (D.D.C. 1991). In New York Times, a reporter submitted a FOIA request to NASA seeking a copy of the voice communications tape recorded aboard the space shuttle Challenger prior to its explosion on January 28, 1986. Id. at 630. NASA provided the transcripts of the tape, but denied the request for a copy of the tape itself, claiming the privacy exemption under § 552(b)(6) ("Exemption (b)(6)").[22] Id. The district court found that the astronauts' families had a "valid and substantial" privacy interest against disclosures which would cause them to suffer additional anguish. Id. at 631. The court stated that the privacy interest included "reasonable expectations of undisturbed enjoyment in the

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[22] Exemption (b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Since the exemption argued in this case exempts records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the standards for determining whether each exemption applies obviously differ. However, both exemptions involve privacy interests, and there is no apparent difference in the privacy interests that may be recognized by the two exemptions. Therefore, the cases discussing the more stringent (b)(6) privacy standard are applicable to this Court's determination of whether the interest asserted by the OIC is a privacy interest recognized by Exemption (b)(7)(C).

solitude and seclusion of one's own home." Id. at 632 (citation omitted). The court noted that exposure to the voice of a deceased family member would cause the Challenger families pain and that the Challenger families would face a disruptive assault on their privacy if the tape were disclosed, because of the notoriety surrounding the accident. Id. at 631-632. The court found that this potential invasion of privacy outweighed the public interest in the disclosure of the tape. Id. at 633.

The court in New York Times cited Badhwar v. United States Department of the Air Force, 829 F.2d 182 (D.C. Cir. 1987), as another court that recognized privacy interests of relatives in various records of deceased family members. New York Times, 782 F.Supp. at 631. In Badhwar, the D.C. Circuit remanded for the district court to determine whether disclosure of a portion of an autopsy report would constitute a "clearly unwarranted invasion of personal privacy," because of the possibility that it would "shock the sensibilities of surviving kin." Badhwar, 829 F.2d at 186. In doing so, the court implicitly but necessarily recognized that such a privacy interest existed and remanded to determine whether the disclosure sought would impact that interest. Id.

Another district court has recognized this family privacy interest with regard to the Foster family members whose privacy is sought to be protected in the present case. See Dow Jones & Co. v. United States Department of Justice, 880 F. Supp. 145, 152 (S.D.N.Y. 1995). In Dow Jones, the court. allowed the disclosure of an allegedly forged note found in Vincent Foster's briefcase. In doing so, the court recognized that the Foster privacy interest that would be impinged by the pain and anguish that would accompany the renewed scrutiny resulting from disclosure of the note. Id. The court allowed disclosure because it found that this

privacy interest would be outweighed by the substantial public interest in viewing the note. Id.

Defendant also cites several cases which implicitly recognize such a privacy interest in the relatives of the deceased. See Hale v. United States Department of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (finding that Exemption (b)(7)(C) applied to exempt from disclosure photographs of a deceased victim, because no public interest could be discerned "that would outweigh the personal privacy interests of the victim's family"), vacated on other grounds, 509 U.S. 918 (1993)[23]; Katz v. National Archives & Records Administration, 862 F. Supp. 476, 473 (D.D.C. 1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy, limited to preventing public disclosure that would cause clearly unwarranted anguish or grief), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); Bowen v. U.S. Food and Drug Administration, 925 F.2d 1225 (9th Cir. 1990) (holding that the FDA properly withheld medical records and autopsy reports under the (b)(6) privacy exemption, thereby necessarily recognizing a privacy interest belonging to others in documents relating to a deceased family member, at least with regard to the autopsy reports); Outlaw v. United States Department of the Army, 815 F.Supp. 505, 506 (D.D.C. 1993) (finding that the deceased's family members' privacy interest was "not substantial" and was outweighed by the public interest in disclosure).

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[23] The Tenth Circuit's decision in Hale was vacated and remanded for reasons unrelated to Exemption (b)(7)(C) [Hale v. United States Department of Justice, 509 U.S. 918 (1993)], but Plaintiff concedes that the Tenth Circuit implicitly reinstated the portion of the opinion discussing Exemption (b)(7)(C) on remand [Hale v. United States Department of Justice, 2 F.3d 1055, 1057-58 (10th cir. 1993)]. Plaintiff's Reply, at 7:4-5.

Plaintiff assails this collection of persuasive authority by arguing that many of these cases did not expressly hold that such a privacy interest exists and by arguing that the courts that recognized such an interest did so "by making their own law'" in contravention of the Supreme Court's definition of privacy. Plaintiff's Motion, at 4:23. Plaintiff cites the Third Circuit's definition of "privacy" in United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 n.5 (3rd Cir. 1980) (quoting Fried, Privacy, 77 Yale L.J. 475, 483 (1968)), as "control over knowledge about oneself." Plaintiff argues that the Supreme Court agreed with this definition in United States Department of Justice v. Reporters Committee, 489 U.S. 749, 762-63 (1989), when it stated: "To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." The Court in Reporters Committee also stated:

> "As we have pointed out before, '[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'"

Id. at 762 (citation omitted).

However, neither this passage nor footnote 5 purports to define the full contours of "privacy" as that term is understood in the FOIA privacy exemptions. Therefore, Plaintiff's argument that all of the foregoing authority is contrary to Supreme Court precedent must be rejected. While the courts in New York Times, Badhwar, Dow Jones, Hale

and Katz may have extended the definition of "privacy" in exempting their respective documents from disclosure, these extensions did not occur in the face of contrary Supreme Court precedent. The Court finds this collection of cases to be persuasive, and therefore finds that Foster's surviving family members possess personal privacy interests that could be infringed by the disclosure of the 11 photographs still at issue. Accordingly, the OIC's assertion of Exemption (b)(7)(C) does not fail for lack of a privacy interest.

2. Public Interest in Disclosure

Plaintiff argues that, even if the surviving family members have a privacy interest in the nondisclosure of the 11 photographs, this privacy interest is outweighed by the public interest in their disclosure. In determining the applicability of Exemption (b)(7)(C), the Court must balance the public interest in disclosure against the possible invasion of privacy caused by the disclosure. Reporters Committee, 489 U.S. at 776; Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1409 (9th Cir. 1996). The government bears the burden of establishing that privacy interests outweigh the public's interest in disclosure. Schiffer, 78 F.3d at 1409-1410.

Defendant claims that Plaintiff has not established that a public interest in disclosure exists. Defendant correctly notes that a public interest cognizable under FOIA is informing the citizenry about how the government is performing its statutory duties. Defendant's Reply, at 13:8-10 (citing Reporter's Committee, 489 U.S. at 733). See also Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 289-90 (9th Cir. 1992) (discussing the "public interest in ensuring the integrity and the reliability of government investigation procedures"). Defendant argues that none of the 11 photographs at issue have any bearing upon how Vincent

Foster performed his duties as Deputy Counsel to the President. Defendant's Reply, at 13:11-13. From this, Defendant argues that Plaintiff merely demonstrates "curiosity" in the photographs, not a cognizable public interest.

However, it is clear that the public interest Plaintiff attempts to identify is not a concern for how Vincent Foster performed his duties. Rather, Plaintiff's concerns appear to be for the circumstances surrounding Foster's death and for the OIC's investigation of that death. Pages 9-33 of Plaintiff's Motion for Summary Adjudication attack the government investigations of Foster's death (as conducted by Independent Counsels Robert Fiske and Kenneth Star) as "grossly incomplete and untrustworthy." These pages attempt to raise several questions, contradictions, and inconsistencies with regard to what the public was told regarding: (1) the extent of Foster's injuries; (2) the statements made by Starr's [sic] family regarding the gun allegedly found in Foster's hand; (2) [sic] the condition of Foster's body as it was found; (4) the condition and location of Foster's eyeglasses; (5) the circumstances surrounding Foster's autopsy; and (6) the condition of the death scene. Plaintiff's Motion, at 9-33. Plaintiff's allegations question the manner in which the OIC investigated Foster's death and implicitly question the manner in which Foster died as well. Thus, the public interest asserted by Plaintiff clearly involves the question of how the OIC performed its statutory duties, not how Vincent Foster performed his duties.

3. Balancing the Privacy Interest with the Public Interest in Disclosure

The issue remains, however, of whether the privacy interests of Foster's family members outweigh the interest in ensuring the integrity and reliability of the OIC's

investigation procedures. There is no doubt that the public interest in ensuring that the OIC conducted a proper and thorough investigation is substantial. However, this interest is lessened because of the exhaustive investigation that has already occurred regarding Foster's death. Five government inquiries have determined that Vincent Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993. The United States Park Police initially investigated the death and conducted another investigation under the direction of Independent Counsel Robert Fiske. Report on the Death of Vincent W. Foster, Jr., By the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association ("Exhibit A to Defendant's Opposition") at 2. Congress conducted two inquiries which reached the same conclusion. Id. Finally, the OIC reached the same conclusion in its report that was recently ordered to be released to the public. Id. at 114. In addition to these investigations, Foster's death has been subject to intense media scrutiny, as evidenced by the several news sources mentioned by both parties in their briefing. For these reasons, the public interest in investigation of Foster's death is not as strong as it was prior to the extensive examination it has already received.

Additionally, the Court is not convinced that the disclosure of these 11 photographs will serve the asserted public interest. Plaintiff has not sufficiently explained how the disclosure of these photographs will advance his investigation into Foster's death. Nor has he sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the OIC investigation. Due to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family members outweigh the public interest in disclosure. See Katz, 862 F.Supp. 484-486 (finding that the Kennedy family members' interests in preventing the disclosure of President Kennedy's autopsy

photos and x-rays outweighed the public interest in their disclosure, because, *inter alia*, "the records had already been reviewed by a number of government entities and private researchers"); New York Times, 782 F.Supp. at. 633 (finding that the Challenger families' privacy interest outweighed the public interest in disclosure).

Based on the foregoing, the Court finds that summary judgment is appropriate in favor of the OIC, with one exception. The Court finds that the privacy interests in the nondisclosure of the photograph of Foster's eyeglasses are not as strong as the privacy interests in the nondisclosure of the other ten photographs. Thus, the balancing tips in favor of the public interests with regard to this photograph. Accordingly, the OIC is required to produce the photograph of Foster's eyeglasses within 90 days.

C. Photographs Already Produced: Color Copies

With regard to the photographs that have been released, Plaintiff objects to the OIC's "redaction of the color from the photographs." Plaintiff argues that he originally requested color copies of the photographs, but has received only black and white copies. Plaintiff argues that the OIC has not cited and cannot cite any FOIA exemption which allows it to redact the color from these photographs.

Defendant counters that it is not required to provide color copies of color photographs. Defendant argues that the version of FOIA that was effective at the time of Plaintiff's request requires only that agencies make records promptly available upon a proper request. 5 U.S.C. § 552(a)(3). Defendant argues that § 552 at that time did not impose a requirement of providing color copies of color photographs. Defendant claims that Plaintiff was provided with the best photocopy available.

However, a new subsection of § 552 became effective in April of 1997. That subsection states: "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B) Since this subsection was effective in January of 1998, when the OIC made records available to Plaintiff, it applies to the OIC's disclosures. Therefore, the issue becomes whether color copies of color photographs are "easily reproducible" by the OIC.

The OIC argues that it is not equipped to make color photocopies and therefore cannot do so without undue burden and interference with its investigatory mandates. The OIC also argues that either engaging an outside contractor to make color copies or allowing plaintiff to make color copies himself would burden the OIC and expose it to the significant risk of leakage of sensitive, non-public material pertaining to its pending criminal investigations. Defendant's Opposition, at 19 n.10.

The problem with this argument is that Plaintiff has offered to pay "the costs of providing the OIC with the appropriate equipment to make suitable copies under circumstances consistent, with the OIC's security needs." Plaintiff's Reply, at 18:12-13. Plaintiff suggests that this offer extends to paying the bill of any source of equipment and personnel that the OIC trusts. *Id.* at 18:13-15. In light of this offer of accommodation, it is difficult to understand how making copies with a color copier in the OIC's offices creates any more of an "undue burden" than doing so with the OIC's own black and white copier. As for the risk of leakage, the court does not believe that this risk would be enhanced by a single delivery of a piece of office equipment.

In footnote 8 of its Reply, the OIC claims that the Court is to "accord substantial weight to any agency's determination as to . . . reproducibility under [§ 552(a)(3)(B)]." 5 U.S.C. § 552(a)(4)(B). Even with this deference in mind, the Court cannot accept the arguments advanced by Defendant. Consequently, the Court finds that color copies are "readily reproducible," and therefore must be provided to Plaintiff within 90 days.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

ALLAN J. FAVISH, Plaintiff-Appellant,
v.
OFFICE OF INDEPENDENT COUNSEL, Defendant-Appellee.

217 F.3d 1168 (9th Cir. 2000)
No. 98-55594

Argued and Submitted Nov. 1, 1999
Filed July 12, 2000

Appeal from the United States District Court for the Central District of California

William D. Keller, District Judge, Presiding.

D.C. No. CV-97- 01479-WDK.

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

Opinion by Judge NOONAN; Partial Concurrence and Partial Dissent by Judge PREGERSON

NOONAN, Circuit Judge:

Allan J. Favish appeals the judgment of the district court granting summary judgment to the Office of Independent Counsel (the OIC) in his action under the Freedom of Information Act, 5 U.S.C. § 552 (1999) (the FOIA). Favish seeks 10 photos relating to the death of Vincent W. Foster, Jr., the Deputy Counsel to the President. Holding the OIC has not established that the photos fall within the privacy

exemption of the FOIA, we reverse the judgment of the district court and remand for further proceedings.

FACTS AND PROCEEDINGS

On July 20, 1993, Foster was found dead in Fort Marcy Park. His death was investigated by the National Park Service and the Federal Bureau of Investigation and by a committee of the House and by a committee of the Senate. *See Accuracy in Media v. National Park Service,* 194 F.3d 120 (D.C.Cir.1999). It was also investigated twice by the OIC. These inquiries all concluded that Foster committed suicide.

Favish is a lawyer not convinced by the reasoning of these prior investigators and skeptical of the thoroughness of their investigations. On January 6, 1997, he filed his request under the FOIA seeking from the OIC 150 photocopies of photographs compiled for law enforcement purposes. The photos were identified in the request by reference to *Hearings Related to Madison Guaranty S & L and the Whitewater Corporation--Washington, D.C. Phase* United States Senate, 103d Cong. (1994), with the exception of one photo of a gun in Foster's hand, identified as having been published by *Time,* March 18, 1996 and on ABC-TV. Favish sought higher quality copies of these already-published materials and copies of 9 unpublished photos. He offered to pay for the reproduction. On January 24, 1997, the OIC denied his request, stating that the photos were exempt under 5 U.S.C. § 552(b)(7)(A) (records whose "release could reasonably be expected to interfere with enforcement proceedings") and under § 552(b)(7)(C) (relating to personal privacy). Favish appealed this decision to a higher level of the agency. On February 19, 1997, the OIC denied his appeal, reiterating the exemptions asserted but not explaining how they applied.

On March 6, 1997, Favish filed this suit. On April 28, 1997, the OIC answered making no reference to any exemption and simply denying that Favish was "entitled to the relief sought." On January 5, 1998, the OIC filed a Vaughn index referring to the requested material; at the same time the OIC released 118 copies of the requested photos in black and white. Favish withdrew his request with respect to 21 photos. Eleven photos remained in dispute, as did Favish's request for color versions of the photos released. Both sides moved for summary judgment.

On March 11, 1998 the district court gave summary judgment to Favish as to his request for color photos, to be paid for by Favish, and as to a photo of Foster's eyeglasses. As to the 10 remaining photos, the court balanced the privacy interest of members of the Foster family against the public interest served by new copies of the photos, concluded that the public interest was outweighed by the privacy interest, and gave judgment for the OIC.

Favish appeals.

ANALYSIS

A Preliminary Question. Sua sponte, the court asked whether Favish was collaterally estopped by having been associate counsel for Accuracy in Media, the losing plaintiff in *Accuracy in Media, supra.* In response, arguing for estoppel, the OIC cited decisions of this circuit where privacy leading to estoppel has been found when a party to a judgment virtually represented "a person now sought to be estopped." Virtual representation, however, has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *United States v. Geophysical Corp. of Alaska,* 732 F.2d 693, 697 (9th Cir.1984); *United States v. ITT Rayonier, Inc.,* 627

F.2d 996, 1003 (9th Cir.1980). We have not found a case where a client is accountable to its lawyer. The identity of interest between Favish and Accuracy in Media is "an abstract interest in enforcement" of FOIA, an interest insufficient to create privity. *ITT Rayonier, Inc.*, 627 F.2d at 1003. Collateral estoppel does not apply.

The Command and Purpose of the Statute. The alpha and omega of this case is the statute that prescribes the conditions for the release of records of a public agency when a person makes a request of the agency for a record within its possession. The statute in relevant part reads as follows:

> (a) Each agency shall make available to the public information as follows:
>
> . . . . .
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A).

Three features of the statutory command are of particular note. The duty to make the information available to the public is mandatory ("shall make", repeated). The agency response is to be made to *any* request and to *any* person (emphasis supplied). The agency response is to be made promptly (no need for emphasis on this term aimed at the sluggishness all too characteristic of bureaucracies).

The words of a statute are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light "on an agency's performance of its statutory duties." *United States Department of Justice v.*

Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73, 103 L.Ed.2d 774 (1989). The statute is a commitment to "the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Id.* (internal quotations omitted). The statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Id.* at 774.

The Statutory Exemption Invoked. First, the OIC denied Favish's request on one ground that made no sense, viz, that release of the photos would interfere with law enforcement proceedings. It took over a year for the OIC to abandon this position. The bulk of the photos requested were already in the public domain. How higher quality photos released to Favish would interfere with law enforcement was not and has not been explained by an agency under a statutory duty to comply promptly with a freedom of information request.

Second, after the OIC did release new copies of the 118 photos it had withheld without adequate explanation, it did not release them in color, nor did it release a new copy of Foster's eyeglasses. The OIC has now released copies in color and a new copy of the eyeglasses photo, thanks to the order of the district court. Not appealing that order, the OIC tacitly admits that it had no legal right to withhold this material.

Third, in its answer to Favish's complaint, the OIC specifically referred to his request for a new copy of the photo published in *Time*, March 18, 1996 and on ABC-TV and stated that the OIC was "without sufficient information or knowledge to form a belief as to the truth of the allegations" that the photo had been published in the forms alleged. This denial was on its face implausible. How could the OIC not discover, with a modicum of diligence, whether

a photo published in national news media had not come from its files? But the OIC did not abandon this posture in the ensuing litigation. In its brief on this appeal, the OIC declared that it did not concede that the photo had come from its files and added that Favish's argument "that the photograph already has been widely disseminated" should, therefore, be rejected. Only on appeal in this court, at oral argument, did counsel for the OIC state that it was true that the OIC possessed the photo referred to in Favish's request.

In the proceedings before the district court, although not in its answer, the OIC invoked this exemption:

> (b) This section does not apply to matters that are
>
> . . . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy....
>
> 5 U.S.C. § 552(b)(7)(C).

Here four terms are significant: "production", that is, the release of the records, is what must be expected to have the undesired result; "expected," meaning what may be predicted with probability by a reasonable person, that is, the standard is objective; "unwarranted", that is, unjustified by the purpose of the statute; and "privacy", that is, a right held dear in our democracy. The root meaning of privacy has perhaps been best expressed in the article that launched its legal career. The principle is "that of an inviolate personality." Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy,* 4 Harv. L.Rev. 193, 205 (1890). The statutory term, it is worth adding, is modified by "personal" and is phrased as "privacy", not "privacy interest."

The statutory command coupled with the statutory exemption requires "balancing" of the personal privacy expected by a reasonable person to be invaded by the production of the records against the public purpose served by release. *Reporters Committee*, 489 U.S. at 776. Deference to the determination of the agency that the exemption applies is not due; the burden of the proof that the request may be properly denied because of an exemption rests with the agency. The court "shall determine the matter de novo." § 552(a)(4)(B). The "burden is on the agency to sustain its action." *Id.*

Application of the Statute. Favish's request focuses on how the OIC conducted its investigation of Foster's death. So doing, his request is in complete conformity with the statutory purpose that the public know what its government is up to. Nothing in the statutory command conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency, although at times evidence of such knowledge has been referred to as enhancing the urgency of the request. *See Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir.1992). Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts; but it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments. *See Washington Post Co. v. U.S. Dep't of Health and Human Services*, 865 F.2d 320, 325 (D.C.Cir.1989).

Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations. To anyone familiar with famous cases in the Old World or in the New it is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point. The statute establishes a right to

look, a right to speculate and argue again, a right of public scrutiny that can be denied only if the relevant statutory exemption applies.

The exemption invoked now is the privacy of "the Foster family members." The OIC relies on a declaration made under oath by Sheila Foster Anthony, Foster's sister, that release of the photos "would set off another round of intense scrutiny by the media," leading the family to be "the focus of conceivably unsavory and distasteful media coverage." The family members who would be distressed by this feared coverage are identified by Anthony as Foster's mother, his children, herself, and Foster's widow.

Strictly speaking, it is not "the production" of the records that would cause the harms suggested by the declaration but their exploitation by the media including publication on the Internet. But the statutory reference to what may "reasonably be expected" encompasses the probable consequences of the release. A preliminary question for decision is whether these consequences would invade the personal privacy of persons protected by the exemption. The question is not free from difficulty due to the imprecision of the statutory phrase.

The statute does not identify whose personal privacy may not be unjustifiably invaded. The statute therefore leaves open the possibility that the exemption does extend to others than the person to whom the information relates, although as a matter of first impression "personal" might seem to refer only to that person. As it happens, the question is not one of first impression in the courts. Release of the photos of the body of the assassinated president has been held to invade the privacy of members of the Kennedy family. *Katz v. National Archives & Records Administration,* 862 F.Supp. 476, 485 (D.D.C.1994), *aff'd on other grounds,* 68 F.3d

1438 (D.C.Cir.1995). Release of a tape of the last conversation of the astronauts on the Challenger has been blocked because it would invade the privacy of their families. *See New York Times Company v. National Aeronautics and Space Administration*, 920 F.2d 1002, 1009- 10 (D.C.Cir.1990) and 782 F.Supp. 628 (D.D.C.1991) (on remand).

It could, no doubt, be suggested that the president or the astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families. That would be a constricted reading of the precedents. What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.

We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

Balancing is one of the most pervasive and most elusive metaphors in the law. We do not literally balance, because what is being brought into a comparison has no weight. To many, balancing sounds like assigning hypothetical weights. To others, it may suggest the kind of equilibrium the biological systems of the body achieve. Taken in either sense, balancing seems to require the exercise of discernment in a particular case. Our standard of review of such a

question has been carefully set out in *Schiffer v. The FBI*, 78 F.3d 1405 (9th Cir.1996). Where facts are not in dispute, we review de novo as a matter of law the district court's determination of "whether a document fits within one of FOIA's prescribed exemptions." *See id.* at 1409.

We do not, however, have before us all the relevant facts. The OIC represents that the 10 withheld photographs are "graphic, explicit, and extremely upsetting." That description is not true of the photo already published in *Time* and on television, showing a hand holding a gun. It may be true of the remaining 9 photos. But no court has ever seen them. The district court has discretion to decide a FOIA case on the basis of affidavits, and affidavits are in some cases sufficient. *Quinon v. F.B.I.*, 86 F.3d 1222, 1229 (D.C.Cir.1996). But when the agency affidavits are insufficiently detailed, *in camera* review is appropriate. *Id.* at 1228. Balancing without a knowledge of what the photos show would be an exercise in the air. Accordingly, we return the case to the district court to examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release.

Conclusion. The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"),[24] Vincent W. Foster Jr.'s surviving

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[24] Exemption 7(C) exempts production of "records or information compiled for law enforcement purposes ... to the extent that production ...

family members have a cognizable privacy interest in the ten post-mortem Polaroid photographs of Vincent Foster's face and body that Appellant Allan J. Favish has requested. I also agree that the family's privacy interest in the post-mortem photographs taken at the scene of Foster's death by a self-inflicted gunshot wound must be balanced against the public's interest in disclosure. I disagree, however, that remand for an in camera inspection of the photographs is necessary before these interests can be properly balanced. I believe the affidavit and exhibits contained in the "Vaughn index"[25] submitted by the Office of Independent Counsel ("OIC") are sufficiently detailed to justify withholding these photographs under Exemption 7(C). I also believe that the district court properly balanced the family's privacy interest against the public's interest in the production of the photographs and concluded that their disclosure " 'could reasonably be expected to constitute an unwarranted invasion of [the family's] personal privacy.'" *See Hunt v. FBI*, 972 F.2d 286, 287-89 (9th Cir.1992) (quoting 5 U.S.C. § 552(b)(7)(C)). On this basis, I would hold that the nine, never-before-released post-mortem Polaroid photographs of Foster's face and body are exempt from disclosure under Exemption 7(C). I would, however, order the release of the photograph of Foster's right hand clutching the gun, which previously appeared in Time Magazine and other media.

I. The Vaughn Index

A. General Principles

In a FOIA case, the government agency seeking to withhold requested documents has the burden of proving the applicability of any FOIA exemption claimed, *see Minier v.*

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could reasonably be expected to constitute an unwarranted invasion of personal privacy...." 5 U.S.C. § 552(b)(7)(C).

[25] The Vaughn index derives its name from the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973).

CIA, 88 F.3d 796, 800 (9th Cir.1996), and "the district courts are to review de novo all exemption claims advanced" by the government, *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C.Cir.1987). Because the agency has sole access to the withheld documents, the ordinary rules of discovery do not operate in a FOIA case to "give each party access to the evidence upon which the court will rely in resolving the dispute between them." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir.1991). "'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system[ ].'" *Id.* (quoting *Vaughn*, 484 F.2d at 824) (alteration in original). To correct this imbalance, the courts devised the Vaughn index requirement, which may be imposed on government agencies seeking to withhold documents requested under FOIA. *See id.; see also Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir.1999) (noting that "[t]here is no statutory requirement of a Vaughn index or affidavit.").[26]

"The purpose of the Vaughn index is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholdings.'" *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir.1995) (quoting *Wiener*, 943 F.2d at 977). The Vaughn "index functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Wiener*, 943 F.2d at 977-78. "Consistent with its purpose, a Vaughn index is not required where it is not needed to restore the traditional adversary process." *Wiener*, 943 F.2d at 978 n. 5. For example, a Vaughn index is

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[26] In fact, "Congress did not speak of an "index" [in FOIA]. The statute says that an agency has [only] to 'notify the person making such request of [the] determination [to withhold the documents sought] and the reasons therefore.' " *Fiduccia*, 185 F.3d at 1042 & n. 9 (quoting 5 U.S.C. § 552(a)(6)(A)(i)).

unnecessary where "the FOIA requester ha[s] acquired sufficient facts to permit the adversary process to function." *Id.* (citing *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir.1981)). "[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index." *Minier*, 88 F.3d at 804.

To fulfill its purpose, a Vaughn index must "identify[ ] each document withheld, the statutory exemption claimed, and [provide] a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Id.* at 977. The Vaughn index may consist of detailed affidavits or other evidence "showing that the information logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800 (citation omitted). Such affidavits may not be "vague" or merely "conclusory," *King*, 830 F.2d at 219, but should disclose "as much information as possible without thwarting the [claimed] exemption's purpose," *Wiener*, 943 F.2d at 978 (citation omitted) (alteration in original).

B. The Sufficiency of the OIC's Vaughn Index

The majority opinion states that the OIC's Vaughn index is insufficiently detailed with respect to the ten post-mortem Polaroids at issue on appeal[27] because the OIC described

[27] The OIC's Vaughn index actually consisted of an affidavit and exhibits numbering over 200 pages that addressed Favish's FOIA request in its entirety. Favish's FOIA request ultimately embraced over a hundred photographs, including 129 photographs and written information appearing in 32 photographs (on front or back). The index provided: (1) photocopies of the fronts and backs of all photographs that had been previously released by the OIC to the United States Senate; (2) a photocopy of the FBI Receipt describing the photographs that had not been previously released at all; (3) a description of the OIC's system for searching for the requested photographs and detailed explanation of the form used for identifying and justifying any redacted information or

these photographs as "graphic, explicit, and extremely upsetting," including the photograph depicting Vincent Foster's hand clutching the gun. Majority Op. at 1174. According to the majority opinion, because the latter photograph is not "graphic" and no court has ever seen the nine other photographs, "[b]alancing [the public's interest in their disclosure against the personal privacy interest in nondisclosure] without a knowledge of what the photos show would be an exercise in the air." *Id.* On this basis, the majority concludes that remand for an in camera inspection of the photographs is necessary. I disagree.

The fact that no court has seen these photographs is not dispositive on the question whether in camera review is required. If that were the litmus test for when in camera review should be undertaken, in camera review would be required in almost every FOIA case. That is not what FOIA requires. Under FOIA, "the decision to conduct an in camera review is committed to the broad discretion of the trial court judge." *Quinon v. FBI,* 86 F.3d 1222, 1227 (D.C.Cir.1996) (citations omitted); *see also* 5 U.S.C. § 552(a)(4)(B) (Supp.1999). "The in camera review provision ... is designed to be invoked when the issue before the District Court *could not otherwise be resolved;* it ... does not mandate that the documents be individually examined in every case." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 224, 57 L.Ed.2d 159 (1978) (emphasis added). Thus, "an in camera review should *not* be resorted to as a matter of course, simply on the theory that 'it can't hurt.'" *Quinon,* 86

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photographs withheld in their entirety; (4) the pre-litigation correspondence between the parties; and (5) narrative descriptions of the requested photographs and written information appearing on them that generally identified the photographs or portions thereof being withheld by the OIC, the exemption claimed, and the justification for withholding the exemption, including the interests to be harmed from the disclosure of the information.

F.3d at 1228 (emphasis added).

I believe that the OIC's Vaughn index's description of the ten post- mortem Polaroid photographs is sufficiently detailed for the district court to resolve the issues in this case. Indeed, it is unclear exactly what an in camera review would add to the district court's already thoughtful and thorough analysis of the issues here.

The OIC's Vaughn index did not just describe the photographs as "graphic" as the majority opinion suggests. The index contained a general narrative description of the nine post-mortem photographs, which stated:

> The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C).

The OIC's Vaughn index also included a photocopy of the FBI "Receipt for Property Received/Returned/Released/Seized" ("the FBI Receipt") that set forth a handwritten description of the ten post-mortem Polaroid photographs and eight other photographs[28] that were taken by the National Park Service at the scene of Vincent Foster's death in Fort Marcy Park. The FBI Receipt

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[28] The other eight Polaroids listed on the FBI Receipt on page 2112 are not at issue on appeal because copies of seven of them were released to Favish pursuant to stipulation lodged in district court on February 9, 1998, and the district court ordered the release of a copy of the eighth photograph, depicting Vincent Foster's eyeglasses lying on the ground at Fort Marcy Park. The eight Polaroids released pursuant to stipulation depict the location and environs where Vincent Foster was found dead and the interior of the car he purportedly drove to Fort Marcy Park.

uses Vincent Foster's initials, "VF," and describes the ten post-mortem Polaroids as follows:

> VF's body--looking down from top of berm
> ... VF's body--focusing on face ... VF's body--focusing on rt. side shoulder/arm
>
> * * * * * *
>
> ... right hand showing gun & thumb in guard
>
> * * * * * *
>
> ... VF's body taken from below feet
> ... VF's body focusing on right side & arm
> ... VF's body focus on top of head thru heavy foliage
> ... VF's body focus on head & upper torso
> ... VF's face--looking directly down into face
> ... VF's face--Taken from right side focusing on face & blood on shoulder....

No one disputes that Vincent Foster died when a .38 caliber revolver was placed in his mouth and the trigger was pulled. It is therefore difficult to understand just how much more detail the OIC would have had to provide to satisfy the majority. Certainly, what the OIC did provide was "as much information as possible without thwarting the purpose of the exemption claimed." *Wiener*, 943 F.2d at 979.

More importantly, Favish does not argue with the OIC's description of what the photographs depict (e.g., the head, face, or body of Vincent Foster). Nor does he suggest that the OIC's description of these photographs was provided in bad faith. His argument is with how the OIC interpreted the photographs and the conclusions the OIC drew from them. In particular, Favish disputes the OIC's conclusion that the photographs establish that Foster committed suicide. Generally speaking, in camera inspection would be appropriate where a FOIA request specifies only the *kind* of

information sought and the Vaughn index provides insufficient detail for the district court to determine whether the withheld documents qualify for the claimed exemption. *See Wiener*, 943 F.2d at 978-79. But where, as here, the Vaughn index provides (1) sufficient detail to permit meaningful review of the exemptions claimed, (2) there is no evidence of bad faith on the part of the governmental agency, and (3) "the dispute turns on the ... parties' interpretations of [the withheld] documents," not their contents, in camera review may not be necessary. *Quinon*, 86 F.3d at 1228. Given such circumstances, I cannot agree with the majority opinion's conclusion that the district court abused its discretion in declining to conduct an in camera review in this case.

Finally, the record and discussion *infra* clearly establish that Favish had "sufficient information [about the post-mortem photographs] to present a full legal argument" in this case and in another FOIA case presented to the Court of Appeal for the District of Columbia. *See Accuracy in Media, Inc. ("AIM") v. National Park Service*, 194 F.3d 120 (D.C.Cir.1999), *cert. denied*, --- U.S. ----, 120 S.Ct. 1966, 146 L.Ed.2d 797 (2000). AIM's FOIA case sought black and white copies of precisely the same photographs that Favish seeks color copies of here. As AIM's co-counsel, Favish wrote the reply brief considered in AIM's appeal to the D.C. Circuit. That reply brief is in large measure identical to the appellate brief filed in his appeal to this court. The D.C. Circuit held the photographs exempt under Exemption 7(C). *See id.* at 123-25. In so ruling, the court rejected the same claim about the Vaughn index that Favish makes in this case, viz: "that the Vaughn index falls short in not revealing just how graphic each of the photos is." *Id.* at 125. As the D.C. Circuit stated: "Given the subject matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly

graphic." *Id.* I agree.

II. Exemption Under 7(C)

A. General Principles

Having determined that in camera review is unnecessary because the factual basis for the district court's decision is sufficient, the next issue is whether the OIC properly withheld the post-mortem Polaroid photographs under Exemption 7(C). Although FOIA's exemptions "'must be narrowly construed,' ... the[se] ... exemptions are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 107 L.Ed.2d 462 (1989) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 48 L.Ed.2d 11 (1976)). Congress enacted Exemption 7(C) and the other FOIA exemptions because it "'realized that legitimate ... private interests could be harmed by release of certain types of information.'" *Id.* at 152 (quoting *FBI v. Abramson*, 456 U.S. 615, 621, 72 L.Ed.2d 376 (1982)). Thus, Exemption 7(C) permits the government to withhold documents "compiled for law enforcement purposes, but only to the extent that [the government establishes that] the production of such records could reasonably be expected to constitute an unwarranted invasion of personal privacy...." 5 U.S.C. § 552(b)(7)(C); *see also Schiffer v. FBI*, 78 F.3d 1405, 1409-10 (9th Cir.1996). To meet its burden, the government need show "only that an unwarranted invasion of privacy could be reasonably expected, not that it will inevitably occur." *Hunt*, 972 F.2d at 288.

In determining whether the government has met its burden of proof, "a court weighs 'the public interest in disclosure against the possible invasion of privacy caused by the disclosure.'" *Id.* at 1409 (quoting *Hunt*, 972 F.2d at 287). The "sole cognizable public interest for FOIA is the interest

'to open agency action to the light of public scrutiny,' to inform the citizenry 'about what their government is up to.'" *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 811 (9th Cir.1995) (quoting *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772-73, 103 L.Ed.2d 774 (1989)). The " 'identity of the requesting party' ... [thus has] 'no bearing on the merits of his [ ] FOIA request.'" *Schiffer*, 78 F.3d at 1411 (quoting *Reporters Comm.*, 489 U.S. at 771) (second alteration in original).[29] Rather, "[w]hether disclosure of a document under Exemption 7(C) is warranted must turn on the *nature of the requested document and its relationship to [this] 'basic purpose ....'*" *Reporters Comm.*, 489 U.S. at 772 (internal citation omitted) (emphasis added).

To determine whether the government met its burden of proof concerning the applicability of Exemption 7(C) to the withheld Polaroid photographs, an understanding of the government's actions concerning Vincent Foster's death is necessary. *See Wiener*, 943 F.2d at 985 ("[T]he public interest in disclosure, and the proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances."). This factual perspective is essential to the determination whether production of the photographs will shed any light on "what their government is up to." *Reporters Comm.*, 489 U.S. at 773.[30]

B. Factual Background

1. Vincent Foster's Death and the Multiple Investigations

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[29] The majority thus mistakenly ascribes undue importance to the fact that Favish is a "skeptical" "lawyer" who personally disagrees with the government's interpretation of the post-mortem photographs.

[30] Here, the fact that the Polaroid photographs were "compiled for law enforcement purposes" is not disputed.

That Ensued

In late afternoon on July 20, 1993, Deputy White House Counsel Vincent W. Foster Jr. was found dead by a private citizen in Fort Marcy Park, a national park located in a Northern Virginia suburb of Washington, D.C. According to eyewitness accounts and the investigative reports of the FBI and U.S. Park Service published by a Senate committee on July 29, 1994, *see Hearings Relating to Madison Guaranty S & L and the Whitewater Development Corporation--Washington, D.C. Phase*, volume II, 103rd Cong. (2nd sess.1994) ("Senate Hearings Volume II"), a 911 call summoned the United States Park Police to a sloping embankment where a body--later identified as Vincent Foster--lay dead. Park Police found Foster's body facing up, with his head positioned slightly below the top of a berm and his body sloping down the embankment, enveloped in foliage; his extremities were apparently not clearly visible to witnesses who stood on the top of the berm. Park Police investigators took Polaroid and 35mm photographs of the death-scene, surrounding environs, and Mr. Foster's face and body--including the ten Polaroids at issue in this appeal. As they did so, they observed a .38 caliber revolver in Mr. Foster's right hand (his thumb still in the trigger guard), gunpowder residue or burns on his right hand web and forefinger, and a gunshot wound to his head. Blood was visible in his nose and mouth area, on his right shoulder area, and in a pool underneath his head. There was no sign of a struggle, no other signs of trauma to the body, and no indication that the foliage or vegetation around his body had been trampled by others.

Five government inquiries investigated the circumstances and cause of Vincent Foster's death. Because Fort Marcy Park is a national park, the U.S. Park Police, a component of the U.S. Park Service, had primary jurisdiction over the first

investigation into Mr. Foster's death. After his death, a handwritten note was found torn in pieces at the bottom of Mr. Foster's briefcase in his White House office. The FBI had jurisdiction over the investigation into the circumstances surrounding the discovery of the note. On August 10, 1993, both the Park Police and the FBI announced their findings. The Park Police concluded that Mr. Foster committed suicide, and the FBI found no criminality in connection with the note's discovery.

A flurry of media exposes followed both announcements. Faced with mounting speculation about the circumstances of Vincent Foster's death and the Park Police's investigation into it, Attorney General Janet Reno appointed Robert B. Fiske, Jr. as a regulatory Independent Counsel, pursuant to 20 C.F.R. §§ 600 and 603.1, in part to investigate the circumstances surrounding Vincent Foster's death and the events that occurred in the White House following his death. On June 30, 1994, Mr. Fiske issued a 58-page public report on the death of Vincent Foster that reached the same conclusion as the Park Police: the "overwhelming weight of the evidence compels the conclusion ... that Vincent Foster committed suicide ..." by a self-inflicted gunshot wound. *Report of the Independent Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr.* (June 30, 1994).

Meanwhile, the House and Senate launched additional inquiries into the circumstances of Vincent Foster's death. Congressman William F. Clinger, Jr., the ranking Republican on the House Committee on Government Operations, instructed the Committee's staff to "thoroughly review ... the investigation into the death of White House aide Vincent W. Foster to determine if there had been any improper manipulation of the investigation by the White House or others." 140 Cong. Rec. H2177-05 (daily ed. Apr. 12, 1994) (statement of Rep. Clinger). And the Senate Committee on

Banking, Housing, and Urban Affairs conducted public hearings to "investigat[e] ... and study" the Whitewater matter and "all matters that have a tendency to reveal the full facts about:.... (B) the Park Service Police investigation into the death of White House Deputy Counsel Vincent Foster; and (C) the way in which White House officials handled documents in the office of White House Deputy Counsel Vincent Foster at the time of his death; and ... make such findings of fact as are warranted and appropriate...." S. Res. 229, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. S7076-01 (June 16, 1994). Both inquiries categorically concluded that Mr. Foster committed suicide. *See Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, On the Death of White House deputy Counsel Vincent W.Foster, Jr.* (Aug. 12, 1994) ("all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."); S.Rep. No. 103-433, 103d Cong., 4 (1995) ("[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self- inflicted gunshot wound.").

Nevertheless, a fifth inquiry was undertaken by the Office of Independent Counsel pursuant to the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599, as reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub.L. No. 103-270, 108 Stat. 732. On August 5, 1994, Kenneth W. Starr was appointed statutory Independent Counsel by the Special Division of the United States Court of Appeals for the District of Columbia Circuit ("the Special Division"). Mr. Starr was authorized to conduct an extensive investigation into the circumstances of Mr. Foster's death, the handling of documents in Mr. Foster's White House office following his death, and other matters. *See Report on the Death of Vincent W. Foster Jr., By the Office of*

Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit (filed July 15, 1997) (leave to publish granted by the Special Division on Oct. 10, 1997, pursuant to 28 U.S.C. § 594) ("Starr Report"). To conduct the investigation, Mr. Starr assembled a team of experienced investigators and renowned forensic experts.[31] *See id.*

After a three-year investigation involving interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs, Mr. Starr reached the same conclusion about Vincent Foster's death that the Park Police, Independent Counsel Fiske, and the House and Senate Committees had reached: "The available evidence points clearly to suicide as the manner of death."[32] *Id.*

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[31] "The investigators included an FBI agent detailed from the FBI- MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C. for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides." *Id.* at 111. The forensic experts included Dr. Henry C. Lee, Ph.D., an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Brian D. Blackbourne, M.D., a forensic pathologist who is Medical Examiner for San Diego County; and Dr. Alan L. Berman, Ph.D, an expert suicidologist who currently is Executive Director of the American Association of Suicidology. *See id.* at 2.

[32] Mr. Starr's conclusion reflected that of Dr. Lee ("[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide...."), Dr. Blackbourne ("Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a . 38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."), and Dr. Berman ("In my opinion and to a 100% degree of medical certainty the death of Vincent Foster was suicide. No plausible evidence has been presented to support any other conclusion.").

In sum, as the district court observed in this case, Vincent Foster's death has been the subject of intense scrutiny by the national media and "exhaustive[ly] investigat[ed]" in the course of five government inquiries. The unanimous, yet independent, conclusion of all inquiries is that Mr. Foster died from a self-inflicted gunshot wound on July 23, 1993 in Fort Marcy Park, Virginia.

2. Favish's FOIA Request and Complaint

On January 6, 1997--seven months before Mr. Starr filed his final report on the death of Vincent Foster with the Special Division of the District of Columbia Circuit and ten months before the OIC received the court's approval to publicly release that report[33]--Favish sent a letter to the OIC requesting the release under FOIA of the "highest quality duplicate photographic [color] prints" of "photographs taken in connection with the investigation into the death of Vincent Foster." Favish specifically requested ten categories of photographs. The photographs requested in eight of the categories were identified by the page in Senate Hearings Report Volume II on which the Senate Committee on Banking, Housing, and Urban Affairs had previously

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[33] The Independent Counsel Reauthorization Act ("the Act") requires an independent counsel "to file a final report with the [Special] division of the [D.C. Circuit] court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." 28 U.S.C. § 592(h)(1)(B). Until that report is filed and the D.C. Circuit approves it, an OIC's investigation is considered ongoing. While an investigation is ongoing, the Act mandates that the OIC "exercise restraint" in releasing information that prosecutors "do not normally provide the public," *Conference Report on S. 24, Independent Counsel Reauthorization Act of 1994*, H.R. 103-511, 140 Cong. Rec. H36907-02, at *H3702 (2d Sess.1994), which would include death-scene Polaroid photographs. Congress instructed the OIC to exercise particular restraint where, as in the case of Vincent Foster's death, it decides not to prosecute anyone. *See id.*

published copies. But, because the photograph of Mr. Foster's right hand clutching the gun and the nine post-mortem Polaroid photographs of Mr. Foster's face and body had not been published in the Senate Hearings Report Volume II,[34] Favish requested these photographs in two separate categories. One category requested the photograph of "Mr. Foster's hand with a gun still in it" that purportedly was broadcast by ABC-TV News in March 1994, reprinted in Time Magazine on March 18, 1996, and appears to have been "listed on page 2112" of the Senate Hearings Report Volume II. In the second category, Favish simply requested those Polaroid photographs "listed on page 2112" of the Senate Hearings Report Volume II. Page 2112 consists of a photocopy of the FBI Receipt discussed *supra*, which bears the handwritten description of the eighteen photographs taken by the National Park Service in Fort Marcy Park within hours of Vincent Foster's death.

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[34] Since the U.S. Park Police turned the post-mortem photographs over to the OIC in 1994, the OIC has maintained that the privacy interests of Mr. Foster's surviving family members in these gruesome death-scene photographs outweigh the public interest in disclosure. For this reason, the OIC has refused to publish them in any form--including the OIC's report to Congress dated June 30, 1994 (prepared by Independent Counsel Robert B. Fiske, Jr.) and its court-approved summary report dated October 10, 1997 (prepared by Independent Counsel Kenneth W. Starr). *See* Senate Hearings Volume II; Starr Report.

The OIC stated in the Starr Report that "based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious." *See* Starr Report at 16-17 (citing by way of comparison, e.g., Navy Report Omits Suicide Notes, N.Y. Times, Nov. 2, 1996, at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to make the notes public.... Many other items in the report are blacked out, like the autopsy report and the identities of people interviewed by investigators."); *Katz v. National Archives and Records Admin.*, 68 F.3d 1438, 1441 (D.C.Cir.1995) ("Out of concern for the Kennedy family's privacy, ... the x-rays and photographs did not become a part of the record of the Warren Commission.")).

By letter dated January 24, 1997, the OIC denied Favish's request in its entirety, citing Exemptions 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure information that may reasonably interfere with an ongoing law enforcement investigation or proceeding, and Exemption 7(C). Favish administratively appealed on January 28, 1997. The appeal was denied by the OIC on February 19, 1997.

On March 6, 1997, Favish filed a complaint for injunctive relief in district court for the Central District of California. The complaint sought release of all photographs and information embraced by Favish's FOIA request.

After the Special Division granted the OIC leave to publicly release the Starr Report on October 10, 1997, the OIC reviewed the photographs and the information written on them that Favish sought by his FOIA request. The Special Division's approval of the Starr Report's public release marked the official conclusion of Mr. Starr's OIC investigation into Vincent Foster's death. Thereafter, the OIC withdrew its objection to production of the photographs requested on the basis of FOIA Exemption (b)(7)(A).

On January 5, 1998, the OIC filed a *Vaughn* index and released black and white copies of 118 photographs in full (front and back) and fourteen photographs in part (front or back) that it had previously withheld. Copies of all of the released photographs were published in Senate Hearings Report Volume II.

On February 12, 1998, the district court entered the parties' "Stipulation to Dismiss With Prejudice Claims to Information Withheld Pursuant to Exemption (b)(3) and Claims as to Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains At Issue."

Pursuant to that stipulation, the only photographs that remained in dispute were eleven post-mortem photographs taken in Fort Marcy Park: one depicting Mr. Foster's right-hand holding the gun, one depicting only Mr. Foster's eyeglasses lying on the ground in Fort Marcy Park, and nine post-mortem photographs of Mr. Foster's body and face. Exemption 7(C) was the only exemption claimed. And the parties stipulated that "[t]he *only* issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." (Emphasis added.)

On February 11 and 13, 1998, the parties filed cross-motions for summary judgment. In support of its summary judgment motion and to establish the significant privacy interest at stake, the OIC filed the declaration of Sheila Foster Anthony, Mr. Foster's surviving sister. Writing on behalf of Vincent Foster's widow, three children, elderly mother, and other family members, Ms. Anthony expressed the

> fervent[ ] belie[f] that releasing any photocopies depicting Vince's body post-mortem would constitute a painful warranted invasion of my privacy, my mother's privacy, and the privacy of Lisa Moody (widow of Vincent Foster), her three children and other members of the Foster family.
>
> Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper and magazine articles and television reports that followed Vince's death. An intensely emotional and private matter drew national attention, and reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. They do to this day. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.
>
> I fear that the release of these photographs certainly would

set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic means. No member of any family should ever be concerned with the possible public exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why the photographs should be released. The mere suggestion that these photographs would be released is unconscionable. The release of these photographs would only bring more agony to members of my family. We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I cannot adequately express the anguish release of these photographs would bring to me and the entire Foster family.

The Court has been asked by the Government to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect Vince's family, but particularly his children, and his 83 year old mother, from further invasion and the distressing events that surely would result from the release of the photographs.

After hearing oral argument and reviewing the evidence, the district court granted partial summary judgment for Favish

and ordered the OIC to produce the Polaroid photograph of Mr. Foster's eyeglasses lying on the ground at Fort Marcy Park and to produce color copies, at Favish's expense, of any photograph released in response his FOIA request if it was originally taken in color. The court, however, ruled that the privacy interests of Mr. Foster's surviving family members outweighed the public interest in disclosure of the nine post-mortem Polaroid photographs of Vincent Foster taken in Fort Marcy Park under Exemption 7(C) and granted the OIC partial summary judgment on this basis. Favish timely appeals.

C. Balancing the Personal Privacy Interest at Stake Against the Public's Interest in Disclosure

1. The Privacy Interest

Favish concedes that release of the nine post-mortem Polaroids of Vincent Foster's face and body are likely to cause to Foster's surviving family members pain and anguish. Favish argues, however, that "family grief" or "emotional grief" is not a legally cognizable privacy interest under FOIA--an argument that the majority and I reject. As noted *supra*, the Court of Appeals for the District of Columbia in *AIM* was confronted with essentially the same FOIA request as that at issue here. As the *AIM* court stated:

> [one] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos. While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy--even though the

holders of the interest are distinct from the individual portrayed.

Id. at 123.

In the present case, the majority and I agree that, as a matter of law, FOIA protects the privacy interests that Vincent Foster's surviving family members have in the post-mortem photographs of the deceased and the intimate details of the circumstances surrounding his death that they reveal. *Cf. Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir.1991) (holding that the privacy interest of a deceased's family in the deceased's autopsy report is protected by FOIA's Exemption (b)(6)); *cf. also Hale v. United States Department of Justice*, 973 F.2d 894, 902 (10th Cir.1992) (finding that Exemption 7(C) exempts photographs of a deceased murder victim from disclosure because no discernible public interest outweighed "the personal privacy interests of the victim's family"), *vacated on other grounds*, 509 U.S. 918, 125 L.Ed.2d 717 (1993), *implicitly reinstated on remand*, 2 F.3d 1055, 1057-58 (10th Cir.); *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C.Cir.1991) (finding that the Challenger astronauts' surviving families have "valid and substantial" privacy interests in the voice communications of the astronauts tape recorded aboard the space shuttle immediately prior to its explosion); *Katz v. National Archives & Records Admin.*, 862 F.Supp. 476, 482 (D.D.C.1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy).

The survivors' privacy interests also involve their "right to avoid [ ] disclosure of personal matters" or at least "to control the dissemination" of such information. *Reporters Comm.*, 489 U.S. at 762, 762-64 & n. 16. Favish argues that such privacy interests have been diminished in this case because the circumstances of Vincent Foster's death are

publicly known. He is mistaken. "The Supreme Court explicitly rejected [a similar] argument in *Reporters Committee*, stating that ... the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Schiffer*, 78 F.3d at 1410-11 (quoting *Reporters Comm.*, 489 U.S. at 770-71; *see also FLRA*, 510 U.S. at 499) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information be available to the public in some form.").

Here, there is simply no question that the release of these photographs "could reasonably be expected to constitute an unwarranted invasion" of the Foster family's personal privacy. Doing so will deprive the family of their right to "avoid" the dissemination of these highly personal photographs and to keep the "personal facts [they depict] away from the public eye." *Reporters Comm.*, 489 U.S. at 769-70 (citing *Whalen v. Roe*, 429 U.S. 589, 51 L.Ed.2d 64 (1977)). And that constitutes a cognizable and significant invasion of their privacy under FOIA. Unless these photographs will "shed light on what the government is up to," and thus serve the sole public interest cognizable under FOIA, they should not be ordered released. *Reporters Comm.*, 489 U.S. at 773.

2. The Public's Interest in Disclosure

The governmental agency in question here is the OIC. The conduct in question is the OIC's two investigations into the circumstances of Vincent Foster's death and their conclusion that he committed suicide. As the district court stated, the public has a substantial interest in ensuring that the "OIC conducted a proper and thorough investigation."

But Favish has made no showing that anyone connected with the OIC's investigations--including Mr. Starr--engaged in wrongful conduct, failed in his or her official duties, or that the nine post-mortem photographs at issue will shed any light on the integrity of their investigations, the nature of the OIC's conduct, or the correctness of its conclusions. Although the government bears the burden of establishing that the photographs are exempt from disclosure under FOIA, *Schiffer*, 78 F.3d at 1409-10 (citing 5 U.S.C. § 552(a)(4)(B)), "the person requesting the information must identify with reasonable specificity, how disclosure would advance the public interest," *Hale*, 973 F.2d at 900. Favish has failed to do so in this case with respect to the nine post-mortem Polaroid photographs of Foster's face and body.

Favish's overarching argument is that the photographs are needed because the OIC's investigation was "grossly incomplete and untrustworthy." Such "generic platitudes clearly are not enough" to tilt the balance in favor of disclosure. *Id.* As the Seventh Circuit observed, the contention that private information is needed "to serve as a watchdog over the adequacy and completeness of an FBI investigation ... would apparently apply to every ... criminal investigation, severely vitiating the privacy ... provision [ ] of [E]xemption (C)." *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir.1981). As a general rule, "[g]overnment records and official conduct [are accorded] a presumption of legitimacy." *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 116 L.Ed.2d 526 (1991). If the mere allegation that a senior government official, like an independent counsel, is "untrustworthy" or incompetent was sufficient to warrant disclosure of private matters that the senior official happened to have compiled, then FOIA's privacy exemptions would be meaningless. *See id.*

Five separate government inquiries have determined that

Vincent Foster committed suicide by a gunshot in Fort Marcy Park on July 23, 1993. The two OIC investigations and the two congressional inquiries each sprung from doubt as to the thoroughness and integrity of the preceding investigation(s). Yet each ultimately reached the same conclusions. And each found no wrongdoing in the preceding investigation(s). Intense media scrutiny of these investigations and of the circumstances of Mr. Foster's death has also reached the same conclusion and has uncovered no wrongdoing. Clearly, the public's interest in further investigating Vincent Foster's death has significantly diminished.

Favish's individual contentions that disclosure of the nine post-mortem Polaroids will serve the public's interest also fall short of justifying their disclosure. Three of Favish's contentions have no logical link to the nine post-mortem Polaroids. Favish disputes statements by Mr. Starr made in his report regarding which officials were present during Vincent Foster's autopsy. But the nine photographs at issue were taken at Fort Marcy Park and depict Mr. Foster's face and body only. They will not shed light on who was present during his autopsy at all. Favish also takes issue with the witness identifications of Mr. Foster's car in Fort Marcy Park at the time of his death. Again, the nine post-mortem photographs will not shed light on the basis for or veracity of these witness statements. Finally, Favish contends that there are possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow. Many of the 119 photographs already released to Mr. Favish depict the gun that was found at the scene of Mr. Foster's death and therefore speak directly to this aspect of the investigation. Nevertheless, because the photograph of Mr. Foster's right hand still clutching the gun has apparently already appeared in the national media and may shed further light on this aspect of

the investigation, I believe that it should be released. The remaining nine post-mortem photographs, however, do not depict the gun and therefore should not be released for this purpose.

Favish's remaining contention is similarly insufficient to justify disclosure. Favish contends that the nine photographs of Vincent Foster's face and body are needed to explain purported deficiencies and inconsistencies in the Starr Report concerning the nature of Mr. Foster's wound.[35] The Starr Report concluded that Vincent Foster died of a self-inflicted "gunshot [wound] through the back of his mouth exiting the back of his head" and that the exit wound was "three inches from the top of the head." *Starr Report* at 1, 31. Favish disputes this conclusion for two reasons: First, Favish contends that the Starr Report did not adequately explain the

---

[35] For the first time on appeal, Favish also contends that the photographs at issue are needed to discern the correctness of two of Dr. Lee's conclusions: (1) that Vincent Foster's body was not "dragged" to the location where his body was found; and (2) that the post-mortem photographs possibly reveal bloodstains on the immediately surrounding vegetation. As purported proof that Dr. Lee's conclusion regarding "dragging" should not be believed, Favish points to the statements of the Park Police on the scene and Dr. Haut that Mr. Foster's body started to "slide down the hill" when they rolled him over to examine him and that they had to "pull" him back up. According to Favish, if Vincent Foster's body slid down the hill at all, Dr. Lee should have reported that there was some evidence of "dragging." At best, Favish's contention is speculative and amounts to nothing more than a difference of opinion.

As purported proof that Dr. Lee's statement concerning possible bloodstains on the vegetation was erroneous, Favish points to statements by a Park Police officer on the scene that "there was no blood splatter on the plants or trees surrounding the decedent's head" and a statement by Dr. Haut that he could recall no blood "on the vegetation around the body." Dr. Lee did not conclude that there were bloodstains on the vegetation, only that after viewing an enlarged, close-up view of the vegetation, there may have been bloodstains. *See Starr Report* at 59. Again, Favish's contention amounts to little more than a difference of opinion, with no suggestion of official misconduct or wrongdoing.

comment of a paramedic on the scene who viewed the body from a distance of two to three feet and initially reported that the *entrance* wound was on Mr. Foster's neck, near the jawline. Second, he contends that the Starr Report failed to mention that the report of the medical examiner at the scene, Dr. Donald Haut of the Fairfax County Medical Examiner's Office, was internally inconsistent. On one page of the report, Dr. Haut described Mr. Foster's wounds as "perforating gunshot wound mouth-head" and on the another page he described it as "mouth to neck." Favish claims that the statement on Dr. Haut's report that the wound was "mouth-head" was the product of an alteration.

As the D.C. Court of Appeals explained in *AIM* when it considered and rejected these same contentions:

> Depending on what one views as the "top" of the head, the discrepancy between [the statement that the exit wound was three inches from the top of the head] and assertions of a neck exit wound may be matters of characterization. Further, the paramedic, after reviewing photos (presumably belonging to the disputed set), admitted that he may have been mistaken about Foster having a neck wound. *Starr Report* at 34 n. 77. Dr. Haut's report is internally inconsistent, with one assertion consistent with the later reports from Congress and two independent counsels. AIM asserts that the consistent entry on Dr. Haut's report was the product of an alternation.... Without more, however, [there is] hardly "compelling evidence" that any government actor has behaved illegally. At least while completing that part of the report, Dr. Haut presumably thought "head" correct....
>
> When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or

> independent counsel inquiries got anything wrong regarding Foster's wounds. The Starr report is altogether credible in its assertion that the photos are "[s]ome of the best evidence" of the nature of Foster's wounds ... and those who have viewed them have concluded that Foster suffered an entrance wound in the mouth and an exit wound in the back of the head. The likelihood that the photos contradict the statements of all four investigating agencies [i.e., the Park Service, the FBI, Congress, and the OIC] seems remote. While we agree that falsification by the agencies would show government illegality ... there is no persuasive evidence of such falsification, much less compelling evidence.

AIM, 194 F.3d at 124. I agree.

III. CONCLUSION

The description in the OIC's Vaughn index of the ten post-mortem Polaroid photographs at issue is sufficiently detailed for the district court to resolve the issues in this case. Consequently, remand for in camera review is unnecessary.

Moreover, I am persuaded that the public's interest in the OIC's two investigations of Vincent Foster's death is more than adequately served by the release of the 118 photographs that Favish has already obtained from the OIC, the photograph of Foster's eyeglasses that the district court ordered released to him, and the photograph of Foster's right hand clutching the gun that I believe should be released to him as well. The public's interest in disclosure of the remaining nine, never-before-released post-mortem Polaroid photographs does not outweigh the privacy interests of Vincent Foster's surviving family in their nondisclosure. Accordingly, under FOIA's Exemption 7(C), the government has established that their production could reasonably be expected to constitute an "invasion of privacy [that] is

'unwarranted.'" *Reporters Comm.*, 489 U.S. at 780.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Allan J. Favish v. Office of Independent Counsel
CV 97-1479-WDK

ENTERED
CLERK, U.S. DISTRICT COURT
January 12, 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PRESENT:

Hon. William D. Keller, Judge
Catherine Jeang, Courtroom Deputy Clerk
None Present, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: None Present

ATTORNEYS PRESENT FOR DEFENDANTS: None Present

PROCEEDINGS:

The context of this summary judgment ruling is informed by the underlying decision of the Circuit as found at 217 F.3d 1168. The decision requires a review in lieu of affidavits. And, the decision to release is to be determined by balancing the respective interests of the public and the survivors. In this case, the appellate court appears to have defined the zone of privacy protection as those photographs that are "graphic, explicit and extremely upsetting." See the decision at page 1174.

Having the foregoing in mind and following review of the photographs in issue as identified in the Notice of Submission Under Seal of 10 Original Polaroid Pictures to Court for Court's In Camera, Ex-Parte Examination, which was filed January 9, 2001, the Court focuses on the first five Polaroids set forth in exhibit 2 to the Notice and concludes as follows:

- The photograph identified as "3 – VF's body looking down from top of berm" must be released, as the photograph is not so explicit as to overcome the public interest.
- The photograph identified as "4 – VF's body - focusing on face" is an absolute intrusion into the zone of privacy of the survivors, and as such is not discoverable.
- The photograph identified as "5 - VF's body - focusing on Rt. side shoulder/arm" is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.

As regards the balance of the photographs referenced at page 46 of the exhibit to the notice, the Court rules as follows:

- The photograph identified as "1 – Right hand showing gun & thumb in guard" is discoverable as it may be probative of the public's right to know.
- The photograph identified as "3 – VF's body taken from below feet" is not discoverable as it does invade the zone of privacy.
- The photograph identified as "4 – VF's body focusing on right side and arm" is discoverable.

- The photograph identified as "5 – VF's body - focus on Top of head thru heavy foliage" is discoverable.
- The photograph identified as "6 – VF's body - focus on head and upper torso" is so explicit as to violate the privacy of the survivors and is not discoverable.
- The photograph identified as "7 – VF's face - looking directly down into face" is again so explicit as to be clearly in violation of the survivors' privacy.
- The photograph identified as "8 – VF's face - Taken from right side focusing on face & blood on shoulder" is again so explicit as to be not discoverable as it clearly violates the privacy of the survivors.

Accordingly, summary judgment is entered in favor of the OIC with respect to photograph #4 from the top section of the exhibit list and photographs #3, #6, #7 and #8 identified in the bottom section of the exhibit list. Absent an appeal, the photographs must be provided to plaintiff's counsel within 60 days [see Federal Rules of Appellate Procedure, Rule 4(a)(1)(B)] of this order. In the event neither party chooses to appeal, the photographs will be provided within 10 days of such determination. In the event of an appeal, the photographs subject to the appeal will remain under seal until such time as there is a final decision by the Court of Appeals.

IT IS SO ORDERED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

ALLAN J. FAVISH,
Plaintiff-Appellant,

SHEILA FOSTER ANTHONY, et al.,
Intervenors – Appellees,

v.
OFFICE OF INDEPENDENT COUNSEL,
Defendant-Appellee.

No. 01-55487
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH,
Plaintiff – Appellee,

SHEILA FOSTER ANTHONY, et al.,
Intervenors – Appellants,

v.

OFFICE OF INDEPENDENT COUNSEL,
Defendant.

No. 01-55788
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH,

Plaintiff – Appellee,

v.

OFFICE OF INDEPENDENT COUNSEL,
Defendant – Appellant,

and

SHEILA FOSTER ANTHONY, et al.,
Defendant-Intervenors.

No. 01-55789
D.C. No. Cv-97-01479-WDK-05

Submitted May 20, 2002**
Filed June 6, 2002

Appeal from the United States District Court for the Central

District of California;

William D. Keller, District Judge, Presiding.

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

The order of the district court of January 11, 2001 is AFFIRMED, except that photo 3-VF's body looking down from top of berm is to be withheld.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

ALLAN J. FAVISH,
Plaintiff-Appellant,

v.
OFFICE OF INDEPENDENT COUNSEL,
Defendant-Appellee.

Nos. 01-55487, 01-55788, 01-55789
D.C. No. CV-97-01479-WDK

Filed August 16, 2002

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

The majority of the panel has voted to deny the petitions for rehearing. Judge Pregerson would grant the petitions for rehearing. Judges Pregerson and O'Scannlain have voted to deny suggestions for rehearing en banc and Judge Noonan recommended denying the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
OCT 1 02

No. 02-409

In The
Supreme Court of the United States

ALLAN J. FAVISH,

Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL,
SHEILA FOSTER ANTHONY,
LISA FOSTER MOODY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS, SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY, IN OPPOSITION

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QUESTION PRESENTED

Whether surviving family members have a privacy interest, protected under Exemption 7(C) of the Freedom of Information Act, in photographs taken by law enforcement officers of their loved one's body at the scene of his suicide.

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BRIEF FOR RESPONDENTS
SHEILA FOSTER ANTHONY AND
LISA FOSTER MOODY
IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 16a) are reported at Favish v. Office of Independent Counsel, 217 F.3d 1168 (9th Cir. 2000). The order of the court of appeals on the second appeal (Pet. App. 56a) is unreported.[1] The order of the court of appeals denying petitions for rehearing, including the dissent of Judge Pregerson (Pet. App. 58a), is unreported. The opinions of the district court (Pet. App. 1a, 53a) are unreported.

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on June 20, 2002. The court entered an order denying a timely petition for rehearing on August 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Petitioner's appendix omits the dissent of Judge Pregerson in the second appeal, which is reproduced in the appendix to the petition for certiorari in this case being filed by Sheila Foster Anthony and Lisa Foster Moody.

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

> (b) This section does not apply to matters that are
>
> * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> * * *
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b).

STATEMENT OF THE CASE

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service and the FBI conducted investigations into his death, and later inquiries were performed by separate committees of the Senate and House of Representatives. Two separate investigations into his death also were conducted by the Office of Independent Counsel, under Robert B. Fiske, Jr., and Kenneth W. Starr, respectively. See Favish, 217 F.3d at 1178-81, Pet. App. 34a-39a (Pregerson, J. dissenting) (summarizing investigations). The latter inquiry took place over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and

autopsy photographs." Id. at 1180, Pet. App. 38a. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded and asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a request under FOIA for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 119 of the photographs identified in his original request. Id. at 1170-71, Pet. App. 18a. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent investigations into it, including extensive, detailed information concerning the gunshot wound that caused Mr. Foster's death.

The ten remaining photographs, which were taken shortly after Mr. Foster's body was discovered, depict his corpse lying in Fort Marcy Park. Mr. Foster's widow and sister intervened in this case because they believe that release of these photographs would constitute a severe and unnecessary invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly traumatic images, the disclosure of these photographs clearly would implicate a privacy interest of their family. Id. at 1182-83, Pet. App. 42a-43a (dissenting opinion of Pregerson, J., quoting declaration of Sheila Foster Anthony). Disclosure of these photographs is precluded by 5 U.S.C. § 552(b)(7)(C), which permits government agencies to deny the release of investigatory materials where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Foster's body at the death scene and the autopsy, including the same photographs at issue here.[2] The D.C. Circuit held that the spouse, parents and children of the deceased have a privacy interest against release of photographs of his body at the death scene. Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999). The D.C. Circuit also affirmed the district court's ruling that plaintiff had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest. Id. at 124-25.

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel ("OIC"), seeking numerous photographs relating to Mr. Foster's suicide. The district court ordered disclosure of some photographs, but refused disclosure of photographs of the death scene that showed Mr. Foster's body or face. The court held that the compelling privacy interest implicated by these photographs outweighed any public interest in their disclosure. Pet. App. 1a.

Plaintiff appealed, arguing that Foster's survivors had no privacy interest in the death scene photographs. The Ninth Circuit rejected that argument, holding "that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure." Favish, 217 F.3d at 1173, Pet. App. 24a. However, the panel reversed and remanded, directing the district court to examine the photographs in camera to weigh the privacy interests of the

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[2] The D.C. Circuit case involved black-and-white copies of the photographs. The present case involves color Polaroid originals. Favish, 217 F.3d at 1177, Pet. App. 32a.

Foster family against the claimed public interest in disclosure. Id. at 1174, Pet. App. 25a. Judge Pregerson dissented, on the ground that the Vaughn index was sufficient to demonstrate that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Id. at 1174-87, Pet. App. 25a-52a.

4. On remand, the district court, observing that the panel decision limited the Foster family's privacy interest to "graphic, explicit, and extremely upsetting" material, concluded that five of the photographs fit this description and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 53a.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitted additional declarations in support of their motion for reconsideration and, when that motion was denied, joined in the OIC's appeal. Plaintiff also appealed.

After in camera review of the photographs, the panel summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should be withheld. Pet. App. 57a. Judge Pregerson dissented to the release of the remaining four photographs.

ARGUMENT

The decision of the court of appeals correctly recognized that surviving family members have a privacy interest in the personal details of a loved one's death. The only other court of appeals to address the issue came to the same conclusion. Accuracy in Media, 194 F.3d at 123. The decision of the court of appeals also accords with district court decisions that recognized the privacy interest of the

surviving families in the autopsy photos and x-rays of President Kennedy's body and the tapes recording the final words of the astronauts who died in the explosion of the spaceship Challenger. Katz v. Nat'l Archives & Records Admin., 862 F.Supp. 476 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); New York Times Co. v. NASA, 782 F.Supp. 628, 631 (D.D.C. 1991).

Petitioner argues that privacy extends only to personal information about oneself, citing this Court's statement that "privacy encompass[es] the individual's control of information concerning his or her person." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989). However, Reporters Committee did not address the issue of survivors' rights. The legislative history of FOIA indicates that the privacy exemptions were intended to protect government files containing "intimate details" of a "highly personal" nature. Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971). The moments surrounding death are "intimate details" of a "highly personal" nature not only for the deceased, but also for his close family. As the Accuracy in Media, Kennedy autopsy and Challenger cases illustrate and the court below correctly recognized, there is a "zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one." Favish, 217 F.3d at 1173, Pet. App. 24a.

The decision below was clearly correct in recognizing that the surviving family members have a privacy interest in the personal details of their loved one's death that qualifies for protection under FOIA Exemption 7(C).[3] On this issue, there is no conflict among the Circuits

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[3] The surviving family members believe that the court of appeals, by releasing some of the death scene photos that the court deemed not to be sufficiently graphic, explicit, and extremely upsetting, erroneously decided three important issues as to which there is a circuit conflict. Accordingly, they are filing a petition for certiorari challenging aspects of the decision below.

or with any decision of this Court, and the petition for certiorari should be denied.[4]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Date: October 15, 2002

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[4] Petitioner also argues that the court of appeals erred by failing to consider partial redaction of the photographs. Petitioner does not allege any conflict among the Circuits or with any decision of this Court on this issue. In any event, the feasibility of redaction is a fact-bound issue that is not appropriate for certiorari.

Supreme Court, U.S.
FILED
DEC 16 2002
CLERK

No. 02-409

In the Supreme Court of the United States

ALLAN J. FAVISH, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The question presented is:

Whether Exemption 7(C) protects the privacy interests of surviving family members in photographs taken of a close family member at the scene of his death.

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In the Supreme Court of the United States

No. 02-409

OFFICE OF INDEPENDENT COUNSEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 56a- 57a) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion by the court of appeals in this case (Pet. App. 16a-52a) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 1a-15a, 53a-55a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. Petitions for rehearing were denied on August 16, 2002. (Pet. App. 58a). The petition for a writ of certiorari was filed on September 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts a variety of categories of information from the government's general duty of disclosure.

One such category, described in FOIA Exemption 7(C), consists of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. This FOIA suit arises from the July 1993 suicide of Deputy White House Counsel Vincent Foster. Foster was found dead in Fort Marcy Park in McLean, Virginia. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. Investigations by the Park Police, the FBI, and congressional committees in both the House of Representatives and the Senate concluded that Foster committed suicide. Pet. App. 17a.

The Office of Independent Counsel twice investigated Foster's death, first through Independent Counsel Robert Fiske, Jr., and later through Independent Counsel Kenneth Starr. Pet. App. 17a, 36a, 38a. Mr. Fiske issued a 58-page report concluding that the "overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide." *Id.* at 36a (citation omitted). Three years later, Mr. Starr filed a 114-page report that concurred with the conclusion of every other investigation, explaining that "[t]he available evidence points clearly to suicide as the manner of death." *Id.* at 38a (citation omitted).

3. A public-interest group, Accuracy in Media, filed a FOIA request with the Park Police seeking the autopsy photographs and death-scene photographs of Foster's body. The government declined to provide the photographs. The Court of Appeals for the District of Columbia Circuit sustained that decision, holding that the photographs are exempt from mandatory disclosure

under FOIA Exemption 7(C). *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).

4. Petitioner, who was an attorney for Accuracy in Media in the D.C. Circuit case, filed his own FOIA request for the ten death-scene photographs, seeking them from the Office of Independent Counsel.[1] The Office withheld them under Exemption 7(C). Petitioner filed suit in the Central District of California. The district court initially sustained the government's invocation of Exemption 7(C). Pet. App. 1a-13a.

A divided Court of Appeals for the Ninth Circuit reversed and remanded the case. Pet. App. 16a-52a. The court agreed with every other circuit court to address the question that "the personal privacy in the statutory exemption [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at 24a. The court then remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Id.* at 25a.

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 25a-26a, but filed a lengthy dissent disagreeing with the majority's remand of the case and its analysis of the public interest in disclosure, *id.* at 26a-52a. He reasoned that the

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[1] Petitioner sought color copies of the photographs, while the D.C. Circuit case involved a request for black-and-white copies of the photographs.

government's *Vaughn* index[2] was sufficiently comprehensive to make a remand for *in camera* review of the photographs unnecessary, *id.* at 30a, and that the "pain and anguish" that petitioner concedes the Foster family would suffer, *id.* at 44a, outweighs the public interest in obtaining those particular photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 46a-51a.

5. On remand, the district court construed the court of appeals' opinion as permitting the withholding under Exemption 7(C) of only those photographs that are "graphic, explicit and extremely upsetting." Pet. App. 53a (citation omitted). The district court accordingly ordered release of five of the ten photographs.[3]

6. The government appealed, and members of the Foster family intervened on appeal. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. The court held, however, that one photograph ordered released by the district court had been properly withheld by the Office of Independent Counsel. Pet. App. 56a-57a. Judge Pregerson dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). 37 Fed. Appx. 863 (9th Cir. 2002) (quoting *Favish* v. *Office of Indep. Counsel*, 217 F.3d

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[2] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[3] Those five included one photograph of a gun in Foster's hand that had been published by *Time* magazine. Pet. App. 17a.

1168, 1187 (9th Cir. 2000)).[4] The court of appeals denied the government's and the Foster family's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing. Pet. App. 58a.

ARGUMENT

Petitioner argues (Pet. 4-11) that this Court should grant review of the question whether Exemption 7(C) protects the privacy interests of surviving family members. Petitioner, however, identifies no conflict in the circuits on that question. To the contrary, the court of appeals' recognition of that privacy interest in this case is consistent with the decision of every court to address the question. See *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 122-123 (D.C. Cir. 1999) (death-scene photographs of Vincent Foster protected from disclosure), cert. denied, 529 U.S. 1111 (2000); *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992) (personal privacy interest in photographs of deceased family member), vacated and remanded on other grounds, 509 U.S. 918, on remand, 2 F.3d 1055, 1057 (10th Cir. 1993) (reaffirming privacy interest under Exemption 7(C)); *Marzen* v. *Department of Health and Human Servs.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (medical records of deceased infant exempt from disclosure based on the parents' right to privacy); *Bowen* v. *United States Food & Drug Admin.*, 925 F.2d 1225, 1228-1229 (9th Cir. 1991) (autopsy reports exempt based on invasion of family member's personal privacy); *Badhwar* v. *United States Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports protected based upon privacy interests of surviving family

[4] Judge Pregerson's dissent is omitted from petitioner's appendix. Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. See note 3, *supra*.

members); see *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10 (Feb. 1975).[5]

Indeed, in the *Accuracy in Media* case, this Court denied a petition for a writ of certiorari presenting the virtually identical question for review in a case involving the same photographs of Vincent Foster that are at issue here. 529 U.S. 1111 (2000). Nothing warrants according this petition any different treatment.

Petitioner's argument (Pet. 6-9) that the court of appeals' decision conflicts with this Court's decision in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), is without merit. In *Reporters Committee*, the Court recognized a protected "interest in avoiding disclosure of personal matters" under Exemption 7(C). *Id.* at 762. Contrary to petitioner's argument (Pet. 6-7), however, the Court did not confine the privacy interest protected by Exemption 7(C) to the two narrow areas of personal information and intimate decisionmaking. To the contrary, the Court held that there were "*at least* two different kinds of [privacy] interests" cognizable under FOIA that were relevant to the facts in that case. 489 U.S. at 762 (emphasis added) (citation and footnotes

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[5] See also *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1004 (D.C. Cir. 1990) (en banc) (NASA "is entitled to an opportunity to prove its claim that release of the [last words of the Challenger astronauts recorded on an audio] tape would invade the privacy of the deceased astronauts, or of their families"); *Katz* v. *National Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994) (holding that President Kennedy's autopsy material was exempt from disclosure because, among other things, it would cause "additional anguish" to the surviving family and would constitute a clearly unwarranted invasion of the family's privacy), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995).

omitted). The Court then held that FOIA's privacy protection encompasses information about a private citizen in government files, including FBI rap sheets, even though the data within the document—information regarding a third party's arrests, convictions, and sentences—were matters of public record. *Id.* at 762-771.

In so holding, the Court stated "as a categorical matter" that, when "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Reporters Comm.*, 489 U.S. at 780; see also *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (FOIA privacy protection extends to home addresses of third parties in government files, even though they may be publicly available).

That rationale fully supports the court of appeals' ruling here. The materials that petitioner seeks are not records or "official information" about agency action, but photographs of a private individual's dead body "that the Government happens to be storing." *Reporters Comm.*, 489 U.S. at 780. The pictures reveal nothing about the government's conduct themselves, but only the tragic consequences of an individual's suicide. That petitioner claims the photographs could be used derivatively to expose errors in *other* governmental records is no answer to *Reporters Committee*'s recognition of a privacy interest in information about private third parties that happens to be held by the government.

Lastly, petitioner argues (Pet. 11-12) that the court of appeals erred by "failing to consider partial redaction" of the six withheld photographs. That fact-specific and record-bound determination does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002

Nos. 02-954, 02-409

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

02-954

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
Petitioner,
v.
ALLAN J. FAVISH et al.,
Respondent.

02-409

ALLAN J. FAVISH,
Petitioner,
v.
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, ET AL.
Respondent.

After Decisions On Writs Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING BY ALLAN J. FAVISH

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INTRODUCTION

On March 30, 2004, this Court issued its opinion in *National Archives And Records Administration v. Allan J. Favish*, No. 02-954. On April 5, 2004, based on its opinion in No. 02-954, this Court denied a petition for writ of certiorari arising from the same case in *Allan J. Favish v. National Archives and Records Administration*, No. 02-409. By this petition I seek a rehearing from both decisions.

FALSE STATEMENTS ABOUT DATE OF LAWSUIT

On pages 2-3 of its opinion this Court made false statements about the circumstances under which my lawsuit originated to make it appear that I initiated this case only after a related case had been lost in which I was one of the attorneys for the losing party. Contrary to this Court's statements, the case of *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), was not "an earlier proceeding" to this case. My FOIA request and FOIA complaint were filed before AIM filed its FOIA request and complaint. As established in my complaint (Joint Appendix 38-52 (J.A.)), my FOIA request was filed January 6, 1997 (J.A. 40, 43) and my complaint was filed March 6, 1997 (J.A. 38 (erroneously states Mar. 5)); Excerpts of Record 741, 743 ("ER") (docket sheet from District Court states date complaint filed)). As established in AIM's complaint, which is a matter of public record, AIM's FOIA request was dated June 6, 1997 and its complaint was not filed until September 12, 1997. *See* http://www.allanfavish.com/aim_complaint.pdf. Contrary to this Court's statements, I *did not* file suit on behalf of AIM in the District Court in D.C., and the District Court in my FOIA case *never* dealt with the collateral estoppel issue because my complaint predated AIM's complaint.

The truth is that the collateral estoppel issue was raised for the first time on November 1, 1999 during oral argument before the Ninth Circuit in the first appeal of my case. At oral argument one of the judges wondered whether my work as an attorney representing AIM should preclude my right to

pursue my own case as a party. On November 16, 1999, my post-oral argument brief and declaration under penalty of perjury on the collateral estoppel issue was filed with the Ninth Circuit establishing that I did not become an employee of the law firm representing AIM until after it filed AIM's complaint. The Ninth Circuit resolved the issue in my favor. *See Favish v. OIC*, 217 F.3d 1168, 1171 (9th Cir. 2000).[1]

THIS COURT IGNORED THE EVIDENCE

This Court stated on page 15 of its opinion that the "Court of Appeals was correct . . . to recognize as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death." But on page 17 of the opinion this Court stated its unsupported conclusion: "Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play." This Court did not mention the evidence in the record establishing the following.

Regulatory Independent Counsel Robert Fiske failed to tell the public and Independent Counsel Kenneth Starr failed to tell the public and the three-judge panel about an FBI memo to the Director of the FBI, written two days after the death, stating that the shot was fired into Foster's mouth *without leaving an exit wound*, thereby directly contradicting Starr, Fiske and the official autopsy report which all concluded that there was an exit wound in the back of the head. *See* MB, at 33-34 ("MB").

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that the medical report by Dr. Donald Haut, the only doctor to examine Foster at the

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[1] Moreover, on or about November 4, 2002, the Solicitor General and his assistant counsel, Patricia A. Millett, filed a document with this Court falsely stating that my FOIA request was filed after the appellate decision in the *AIM* case. This falsehood also is stated by the DOJ on its website at http://www.usdoj.gov/oip/foiapost/2003foiapost17.htm. I filed a response with this Court on November 12, 2002 stating the correct facts.

park, reported a neck wound that officially did not exist. Moreover, certified copies of his report are not the same and appear to have been improperly altered by obliteration of a word rather than drawing a line through the word so it can still be read, as is standard practice for medical records. *See* MB, at 27-28.

Starr failed to tell the public and the three-judge panel that the Park Police and the only medical doctor at the death scene, Dr. Haut, reported that they did not see any blood spatter on the vegetation that would have appeared behind Foster's head immediately after he allegedly shot himself while sitting up on the ground. *See* MB, at 19-20.

Starr failed to tell the public and the three-judge panel that the first person officially to see Foster's deceased body and who testified that he did not see any gun in Foster's hand, also testified that the "gun in hand" photo that was leaked to the media in 1994 did not depict what he saw. *See* MB, at 20-21.

The official death gun appears black. Foster's widow Lisa failed to identify the official death gun from a photograph nine days after the death, in part, because the gun was not silver, the color of a gun the Fosters owned. According to the FBI, Lisa was shown the official death gun in May 1994 and the FBI stated that she "believes that the gun found at Fort Marcy Park may be the silver gun which she brought up with her" from Arkansas. Despite the obvious invalidity of an identification of a black gun as being silver, and without stating the gun colors and other relevant background facts, Fiske reported that Lisa "stated that the gun looked similar to one that" Foster owned. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Fiske did this. Starr failed to tell the public and the three-judge panel that one of Lisa's reasons for not identifying the gun in the photo shown to her nine days after the death was because it was not silver. Also absent from Starr's report is that the FBI expressly stated that Lisa

believed the gun shown to her in May 1994 was silver as it was being shown to her. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Fiske's deputy, Roderick Lankler and Lisa's attorney, James Hamilton (who represented her in this case) and at least two FBI agents, apparently failed to note at the May 1994 interview that in their presence, Lisa described a black gun as being silver. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Lisa reportedly identified a black gun as silver, *as it was being shown to her*, in May 1994. *See* MB, at 22-25.

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that Foster's nephew, who was the surviving family member most familiar with the family's guns, could not identify the black official death gun, largely because of its color. *See* MB, at 27.

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that then United States Park Police Chief Robert Langston made a false statement to the public when he stated at a press conference in August 1993 that the Foster family had identified the official death gun as one of Foster's guns. *See* MB, at 26-27.

Starr falsely implied that the Park Police observed the entire autopsy but Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that before the Park Police arrived, Foster's tongue and soft palate were removed by the autopsy doctor who violated policy by beginning the autopsy before arrival of the police. (The tongue and soft palate were significant because there is controversy over whether there was an entrance wound in Foster's neck that would have resulted in a bullet path through the tongue and soft palate.) *See* MB, at 28-29.

Starr failed to tell the public and the three-judge panel that three of the four witnesses who according to the Government, saw Foster's car in the parking lot between 4:30 p.m. and just before 6:00 p.m., after he was dead, reported seeing a car that was brown and did not report seeing a car

that was the color of Foster's car, gray. Although Starr accurately reported that the fourth of these witnesses reported seeing a brown car, Starr concluded that Foster's gray car was in the parking lot without explaining why all four of these witnesses reported seeing the same color car, brown, and did not report seeing a gray car. *See* MB, at 29-31.

Starr relied on Dr. Henry Lee's conclusion that Foster's clothes revealed no evidence that Foster's body had been dragged, without telling the public and the three-judge panel that this conclusion was worthless because the Park Police stated that they dragged Foster's body when it began to slide down the hill during an examination. *See* MB, at 31-32.

Starr implied that the reason for the lack of readable x-rays of Foster is that the x-ray machine was not functioning properly. However, Starr failed to tell the public and the three-judge panel that the records show that the first service call for the x-ray machine was made *more than three months after* Foster's death. Also, if the machine was not functioning properly on July 20, 1993, Starr failed to explain why another machine was not used to take x-rays of Foster, a very high Government official, or why there are no records showing a service call for the machine at that time. *See* MB, at 37-40.[2]

This Court's unsupported conclusion about the lack of evidence is even more incredible in light of the fact that Justice Scalia thought at least one of these pieces of evidence was so significant that he asked a question about it at oral argument. He asked Lisa's attorney James Hamilton about the Haut Report's apparent alteration and its statement about a neck wound. Hamilton replied that Starr "answered the question" about the Haut Report in his report on the Foster death. However minutes later I told this Court during oral argument that Hamilton's response was "not true" because

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[2] The citations in my merits brief to the addendum to my opening brief in the second appeal to the Ninth Circuit should have been to the addendum to my reply/answering brief in that appeal.

Starr never discussed in his report on the Foster death the apparent alteration in the Haut Report or its statement about a neck wound. *See* Transcript of Oral Argument, at 20-21 & 34-35.

Moreover, this Court failed to discuss *a declaration under penalty of perjury* by investigative journalist Ambrose Evans-Pritchard stating that he has seen a photograph of what appears to be a wound in Foster's neck: "I have seen the photograph showing an apparent neck wound to Foster's neck . . . ." ER 601, 656, 662.

FALSE DESCRIPTION OF GOV'T INVESTIGATIONS

Contrary to this Court's statements on pages 2 & 16 of its opinion, the evidence established that no Congressional Committee conducted an investigation of whether Foster was murdered or committed suicide at the park. On page 46 of the transcript of the oral argument, I referred this Court to the pages of the record that establish this fact. The evidence established that the Senate Banking Committee's "investigation" into the Foster death was limited to the issue of whether the United States Park Police's investigation was proper. The Banking Committee did not conduct an investigation to determine whether Foster was murdered or committed suicide in the park. This point was stated expressly by the Senators themselves. ER 602-09.

No committee in the House of Representatives conducted an investigation of Foster's death. Rather, only a single Congressman wrote a six-page "Summary Report" of his investigation into the death. ER 277, 288. That report does not answer the questions I raised in this case. Moreover, the Park Police, FBI and Independent Counsel investigations were permeated with FBI agents. ER 133, 166, 287, 302, 350, 351, 357. This Court did not address the conflict of interest inherent in the Fiske and Starr offices using FBI agents to investigate the FBI's investigation.

IGNORING AND DISTORTING THE LAW

This Court held that when Congress used the word "privacy" in 1966 in the FOIA and again in amending the

FOIA in 1974, it intended a definition that allowed for a person to have a privacy interest in a document that does not contain any information about the person in the document. In support of its position, this Court cited non-FOIA cases dealing with the definition of "privacy" and concluded that Congress in 1966 and 1974 must have intended for "privacy" as used in the FOIA to have the same meaning as expressed in those non-FOIA cases. At pages 10-11 of its opinion, this Court stated: "We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms."

However, only two of the cases cited by this Court predated 1966 and 1974 when Congress enacted the FOIA and added the privacy exemption to Exemption 7(C). Therefore, among the cases cited by this Court only these two cases could have influenced Congress and played a role in shaping its intent regarding the meaning of "privacy" as used in the FOIA. These two cases are a New York state case, *Schuyler v. Curtis*, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895) and a Georgia state case, *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930). Both of these cases defined "privacy" so as to allow people to claim a privacy interest in documents that contained information about their deceased relatives, but no information about them.

Yet this Court failed to cite two federal court cases that surveyed the case law regarding this "survivor privacy" theory in 1969, virtually contemporaneously with enactment of the FOIA and its amendment in 1974. I cited both federal cases during oral argument, as established on page 31 of the transcript. These two cases established that the cases endorsing this "survivor privacy" theory were an aberrational minority of cases that should be rejected. The most logical assumption is that Congress intended the word "privacy" to mean what the overwhelming majority of cases had said it means, as opposed to what an aberrational minority of cases

had said it means. These two federal cases are *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969) and *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969).

On page 10 of its opinion, this Court cited the Restatement of Torts in support of it holding that a person can have a privacy interest in a document that has no information about the person in the document. This Court implied that the Restatement of Torts endorses its definition of privacy that the Court ascribed to the 1966 Congress. But that is not the case and this Court's description of the Restatement section to which it referred was false.

This Court stated: "Restatement (Second) of Torts §652D, p. 387 (1977) (recognizing that publication of a photograph of a deceased infant--a hypothetical 'child with two heads'--over the objection of the mother would result in an 'inva[sion]' of the mother's 'privacy')." This makes it appear that the Restatement takes the position that the mother has a privacy interest in a document that has no information about her in it, the photograph of her child. But the Restatement does not endorse such a position. Instead, Restatement (Second) of Torts §652D states:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

This rule does not endorse the proposition that a person has a privacy interest in a document that does not contain any information about the person.

The Restatement follows its sections, like Section 652D, with illustrations that help explain the respective sections. This Court's parenthetical comment about this Restatement section inaccurately paraphrased Illustration no. 7 to the

section. The full text of Illustration no. 7 to Section 652D states:

> A gives birth to a child with two heads, which immediately dies. A reporter from B Newspaper asks A's permission to photograph the body of the child, which is refused. The reporter then bribes hospital attendants to permit him, against A's orders, to take the photograph, which is published in B Newspaper with an account of the facts, naming A. B has invaded A's privacy.

Therefore, Illustration no. 7 includes the vital fact that B Newspaper published "an account of the facts, naming A." This fact was essential to making B Newspaper's conduct a violation of A's privacy because this fact established that information about A was disclosed. Thus, A, the mother, had her privacy violated because information about her was disclosed by B, the newspaper. This Court omitted this essential fact from its description of Restatement section 652D and thereby implied that the section recognized that a person can have a privacy interest in a document that does not contain information about the person. That implication is false. Restatement section 652D does not support this Court's position.

IGNORING REDACTION OF THE PHOTOGRAPHS

The FOIA states: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This Court held on pages 9-10 of its opinion that the privacy interest it found was based on "the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes" and "a family's control over the body and death images of the deceased. . . ." Therefore, the Government has no right to withhold those portions of the

photographs that do not show the body. This issue is raised on page 47 of my brief, but this Court ignored the issue.

IGNORING THE "DERIVATIVE USE" ISSUE

On page 8 of its opinion this Court described the privacy of the Foster family members it was protecting as their right "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility. . . ." This Court then relied upon a declaration by Sheila Foster Anthony, one of his sisters, who stated that "that the family had been harassed by, and deluged with requests from, '[p]olitical and commercial opportunists' who sought to profit from Foster's suicide." This Court cited Sheila's claim that disclosure would cause "intense scrutiny by the media" that would lead to "unsavory and distasteful media coverage." Thus, this Court based its decision on Sheila's description of what disclosure might lead to, not the information that disclosure would reveal.

As I stated on page 48 of the transcript of the oral argument, this contradicts Justice Scalia's concurrence in *Dept. of State v. Ray*, 502 U.S. 164 (1991), a case that dealt with the word "privacy" and the word "constitute" as used in the FOIA's Exemption 6, but equally applicable to Exemption 7(C). Justice Scalia stated that "consideration of derivative uses . . . to establish an invasion of privacy, is impermissible" because the FOIA does not say that the Exemption applies "whenever disclosure would '*cause*,' '*produce*,' or '*lead to*' a clearly unwarranted invasion of personal privacy" but "whether 'disclosure' would '*constitute* a clearly unwarranted invasion of personal privacy' (emphasis added);" and therefore "it is unavoidable that the focus . . . must be solely upon what the requested information *reveals*, not upon what it might lead to." *Ray*, at 180.

CONCLUSION

Rehearing should be granted.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I, Allan J. Favish, petitioner and counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

April __, 2004

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Allan J. Favish